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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~388~~ 40

JOHN BROOM AND E. A. WHITAKER, APPELLANTS,

vs.

JAMES C. ARMSTRONG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED MAY 24, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 328.

JOHN BROOM AND E. A. WHITAKER, APPELLANTS,

vs.

JAMES C. ARMSTRONG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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1 In the District Court of the First Judicial District of the Territory of Utah, County of Weber.

JAMES C. ARMSTRONG, Plaintiff,
vs.
MILLS H. BEARDSLEY, Defendant. } Complaint.

James C. Armstrong, the plaintiff in the above-entitled action, complain-g of Mills H. Beardsley, the defendant in said action, alleges—

That on a certain day, to wit, the 14th day of January, 1885, at the county of Weber, in the Territory of Utah, the said defendant (signing the same M. H. Beardsley) made his certain promissory note in writing, bearing date of that day, in the words and figures following, to wit:

$8,000. OGDEN, UTAH, *January 14th*, 1885.

Four months after date, for value received, I promise to pay to the order of James C. Armstrong eight thousand dollars, payable in U. S. gold coin, at the Commercial National Bank of Ogden, Utah, with interest at one per cent. per month, payable monthly from date hereof until paid, both before and after judgment, and, if not paid at maturity, ten per cent. additional as cost of collection.

Due ——. No. —.

M. H. BEARDSLEY.

[On margin:] Commercial National Bank, Ogden City, Utah.

2 And then and there delivered the same to the said James C. Armstrong, plaintiff.

That the said defendant, Mills H. Beardsley, to secure the payment of the said principal sum and interest thereon, as mentioned in said promissory note, according to the tenor thereof, did, at the same time and place, execute under his hand and seal and deliver to the said Jas. C. Armstrong (signing the same M. H. Beardsley) a certain chattel mortgage, bearing date on that day and conditioned for the payment of the said sum of eight thousand dollars and interest thereon at the rate and at the time and in the manner specified in said mortgage and the said promissory note and according to the conditions thereof, which said mortgage was duly acknowledged, verified, and certified, so as to entitle it to be recorded, and the same was afterwards, to wit, on the 17th day of January, 1885, duly recorded in the office of the county recorder of the said county of Weber in Liber One of Chattel Mortgages, pages 43 & 44, a copy of which said mortgage, with the endorsements thereon, is hereunto annexed, marked "Exhibit A," and made a part of this complaint, and said mortgage, at the time it was so delivered to said James C. Armstrong, was accompanied by an affidavit of the parties

thereto endorsed on said mortgage, a copy of which said affidavit is a part of said "Exhibit 'A.'"

3 And said defendant, Mills H. Beardsley, was a resident of said Weber county, Utah, at and during all the time herein mentioned; that no part of said principal sum nor of the interest on the said principal sum mentioned in said promissory note and in the said mortgage has been paid, except, May 20th, 1885, $200 on the principal and the interest to July 14th, 1885, and 7,800 dollars of the principal sum mentioned in said promissory note and mortgage, together with the interest thereon at the rate of one per cent. per month from the 14th day of July, 1885, still remains due and unpaid (and also $780.00 additional as cost of collection) from said defendant to said plaintiff (the said $780.00 being the stipulated cost of collection mentioned in said note and in said mortgage), and the said $780.00 also remains wholly due and unpaid.

That the plaintiff is now the lawful owner and holder of said promissory note and of said chattel mortgage; that the condition of said mortgage has not been performed and the property described in said chattel mortgage is greatly insufficient to discharge the said mortgage debt. All that portion of said mortgaged property described in said chattel mortgage as situate in said Broom Hotel building has been used in carrying on the hotel business

4 there, and will sell to better advantage if inventoried and sold in a lump. Wherefore the plaintiff prays judgment against the said defendant for the sum of seven thousand eight hundred dollars, with interest at the rate of one per cent. per month from the 14th day of July, 1885, and for costs of suit, and for $780.00, attorney's fee, provided for in said mortgage and in said note mentioned as cost of collection; that the usual decree may be made for the sale of said mortgaged chattels by the sheriff of said county or the United States marshall of said Territory, according to law and the practice of this court; that said portion of said property so used as aforesaid in carrying on the hotel business be sold in a lump or in parcels, in the discretion of the officer making the sale; that the proceeds of said sale may be applied in payment of the amount due to the plaintiff, and that said defendant and all persons claiming under him subsequent to the execution of said mortgage upon said chattels, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed by all right, claim, or equity of redemption in the said chattels and every part thereof, and that the said plaintiff may have judgment and execution against the said defendant, Mills H. Beardsley, for any deficiency which may remain

5 after applying all the proceeds of the sale of said chattel property applicable to the satisfaction of said judgment.

That the plaintiff or any other parties to the suit may become purchaser at said sale; that the sheriff or other officer execute bill of sale to the purchaser, and that said purchaser be let into the possession of the chattels on the purchase thereof, and that plaintiff may have such further relief in the premises as to this court may seem meet and agreeable to equity, and particularly that a receiver may be appointed immediately by the court to take charge of and

hold possession of said mortgaged property and [illegible] till it can be sold on the judgment, order, or decree of this court.

RANSFORD SMITH,
Attorney for Plaintiff.

TERRITORY OF UTAH, }
County of Weber, } *ss:*

James C. Armstrong, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

J. C. ARMSTRONG.

6 Subscribed and sworn to before me this 22nd day of July.
[NOTARIAL SEAL.] RANSFORD SMITH,
Notary Public.

(Endorsed:) # 697. Complaint. District court, 1st judicial district, county of Weber. James C. Armstrong, plaintiff, *vs.* Mills H. Beardsley, defendant. Filed July 22nd, 1885. A. C. Emerson, clerk, by T. A. Perkins, deputy clerk. Ransford Smith, attorney for plaintiff.

EXHIBIT "A" TO COMPLAINT.

This indenture, made the fourteenth day of January, in the year of our Lord one thousand eight hundred and eighty-five, between Mills H. Beardsley, a resident of Ogden City, in the county of Weber and Territory of Utah, the party of the first part, and James C. Armstrong, of the same place, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of eight thousand dollars, lawful money of the United States of America, to him in hand paid, does grant, bargain, sell, convey, and confirm unto the said party of the second part and his heirs and assigns the following-described personal property to wit: All the personal property and furniture and fixtures now used by said party of the first part in carr-ing on the hotel business in Ogden City, Utah,
7 the same being in the Broom Hotel building, in said city, and being all the personal property in said building, except the property specifically exempt from execution and which does not have to be selected to be exempt; also the provisions and coal now supplied for running said hotel are to be and are excepted from the operation hereof; the ice in the ice-house on Wall street, in said city, being about 200 tons; also the ice-house behind the Broom Hotel, in said city; also one black horse called Jerry, one bay mare called Grace and her colt, three buggies, three sets of single harness, one set of double harness, and one two-seated sleigh.

Said property is situated at Ogden City, in the county of Weber

and Territory of Utah, and is hereby warranted by the said party of the first part to be free and clear of all incumbrances or adverse claims and is to be and remain in the possession of the mortgagor.

This conveyance is intended as a mortgage to secure payment of a certain promissory note, bearing date 14th January, 1885, executed by said party of the first part for the sum of eight thousand dollars and payable to the order of the said party of the second part four months after date, with interest thereon from date until paid at the rate of one per cent. per month, payable monthly,
8 and ten per cent. additional as costs of collection if not paid at maturity.

And these presents shall be void if such payment be made according to the tenor and effect thereof; but in case default be made in the payment of the principal or interest as in said note provided, or should any person remove or attempt to remove said property or any part thereof from the said county of Weber without first having obtained the written consent of the party of the second part hereto, his legal representatives or assigns, or should the party of the second part, his legal representatives or assigns, at any time deem himself unsafe or insecure, the said party of the second part, his legal representatives or assigns, are hereby empowered to take the said property or any part thereof wherever the same may be found and safely keep the same at the expense of the said party of the first part until the note secured hereby becomes due, and if it is not paid at maturity then proceed to sell said property in the manner prescribed by law, and out of the money arising from such sale to retain the principal and interest, together with the costs and charges of making said sale and said ten per cent. for attor-
9 ney's fees, and *over* the overplus, if any there be, shall be paid by the party making such sale on demand to the said party of the first part, his heirs or assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

M. H. BEARDSLEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
RANSFORD SMITH.
O. E. HILL.

TERRITORY OF UTAH, } ss:
County of Weber, }

Mills H. Beardsley, the party of the first part hereto, and James C. Armstrong, the party of the second part hereto, being first duly sworn, says that the within and foregoing mortgage is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the mortgagor.

M. H. BEARDSLEY.
J. C. ARMSTRONG.

Subscribed and sworn to before me this 14th day of January, 1885.

RANSFORD SMITH,
Notary Public.

10 TERRITORY OF UTAH, }
County of Weber, } ss:

On this 14th day of January, A. D. one thousand eight hundred and eighty-five, before me, Ransford Smith, a notary public in and for said county, personally appeared Mills H. Beardsley, personally known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal at my office, in Ogden City, Utah Territory, the day and year in this certificate first above written.

RANSFORD SMITH,
[SEAL.] *Notary Public.*

(Endorsed:) Chattel mortgage from M. H. Beardsley to James C. Armstrong. Dated 14th of January, 1885. Filed for record January 17, A. D. 1885, at four o'clock p. m. Recorded in Book One of Chattel Mortgages, pages 43 & 44. F. J. Cannon, county recorder, by John Homer, deputy recorder.

11 In the District Court of the First Judicial District of the Territory of Utah, Weber County.

JAMES P. ARMSTRONG, Plaintiff,
vs.
MILLS H. BEARDSLEY, Defendant.

The People of the Territory of Utah sends greeting to Mills H. Beardsley, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the Territory of Utah and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons if served within this county, or if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain judgment and decree of this court for the sum of seven thousand eight hundred dollars, with interest thereon at one per cent. per month from July 14th, 1885; for costs of suit herein; for $780.00, attorney's fees alleged to be due and owing plaintiff from you upon a certain promissory note and mortgage securing the same made and delivered to plaintiff by you on January 14th, 1885—

12 For usual decree of sale of property described in said mortgage and mentioned in said complaint; for application of proceeds of sale in satisfaction of plaintiff's claim; that subsequent claims be barred and foreclosed of all rights, claim, & etc., in or to said property; for judgment and execution for any balance

that may remain; for execution of bill of sale by officer selling; for further relief, and particularly for the appointment by the court of a receiver to take charge of said property.

For fuller particulars reference is hereby made to said complaint, on file herein.

And you are hereby notified that if you fail to appear and answer the said complaint as above required the said plaintiff will apply to the court for the relief demanded therein.

Witness the Hon. Orlando W. Powers, judge, and the seal of the district court of the first judicial district in and for the Territory of Utah, this 23rd day of July, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] A. C. EMERSON, *Clerk*,
By T. A. PERKINS, *Deputy Clerk*.

(Endorsed.)

TERRITORY OF UTAH, } ss:
County of Weber, }

I hereby certify and return that I served the within sum-
13 mons in Ogden City, said county and Territory, on July 23rd, 1885, by delivering a true copy thereof, attached to a certified copy of the complaint in this action, to the within-named defendant, M. H. Beardsley, personally.

E. A. IRELAND, *U. S. Marshall*,
By T. A. PERKINS, *Deputy*.

Dated — 30, 1885.
Fees $2.00.

[Endorsed:] No. 697. Original. District court, first judicial district, county of Weber. James C. Armstrong, plaintiff, *vs.* Mills H. Beardsley, defendant. Summons. Ransford Smith, plaintiff's attorney. Filed on return July 30th, 1885. A. C. Emerson, clerk.

At a district court of the first judicial district of the Territory of Utah, county of Weber, held at the court-house, in Ogden City, county of Weber, on the 21st day of September, A. D. 1885.

Present: The Hon. Orlando W. Powers, judge of the first judicial district.

A. C. ARMSTRONG, Plaintiff,
vs.
M. H. BEARDSLEY, Defendant.

14 On motion of Ransford Smith, Esq., the plaintiff herein is allowed to file an amended and supplementary complaint herein and John Broom and E. A. Whittaker are made parties defendant in the action, whereupon Messrs. Kimball and Heywood and P. H. Emerson enter appearance for said defendants and in open court waive service of summons on said amended and supplemental complaint.

I, T. A. Perkins, clerk of the district court [illegible] district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court this 24th day of June, 1886.

[SEAL.] T. A. PERKINS, *Clerk.*

(Endorsed:) No. 697. District court, first judicial district, county of Weber. J. C. Armstrong, plaintiff, against M. H. Beardsley, defendant. Certified copy of order allowing supplemental complaint filed and making new parties. Entered Sept. 21st, 1885.

15 In the District Court of the 1st Judicial District of Utah Territory, Weber County.

JAMES C. ARMSTRONG *vs.* MILLS H. BEARDSLEY. } Order Making New Parties and Granting Leave to File an Amended and Supplemental Complaint.

On motion to the court by Ransford Smith, attorney for plaintiff, and on his producing and reading the plaintiff's verified amended and supplemental complaint herein, it is ordered by the court, for good cause shown, that John Broom and E. A. Whittaker be and they are made parties defendant herein, and said plaintiff has leave to file herein his said amended and supplemental complaint against said Mills H. Beardsley, John Broom, and E. A. Whittaker, and the same is accordingly filed 21st Sept., 1885.

ORLANDO W. POWERS, *Judge.*

(Endorsed:) No. 697. First dist. court, Utah. James C. Armstrong *vs.* Mills H. Beardsley. Order making new parties, granting leave to file an amended and supplemental complaint. Filed Sept. 21st, 1886. A. C. Emerson, clerk.

16 In the District Court of the First Judicial District of the Territory of Utah, Sitting in the County of Weber.

JAMES C. ARMSTRONG, Plaintiff, *vs.* MILLS H. BEARDSLEY, JOHN BROOM, and E. A. WHITTAKER, Defendants. } Amended and Supplemental Complaint.

James C. Armstrong, the plaintiff in the above-entitled action, complaining of Mills H. Beardsley, the original defendant in said action, and of John Broom & E. A. Whittaker, who have, by order of the court, been duly made defendants herein, alleges for his amended and supplemental complaint which he now files herein by leave of the court that on a certain day, to wit, the 14th day of January, 1885, at Ogden, in the county of Weber, in the Territory of Utah, the said defendant, Mills H. Beardsley (signing himself

M. H. Beardsley), made his certain promissory note in writing, bearing date on that day, in the words and figures following, to wit:

$8,000.00. OGDEN, UTAH, *Jan. 14th*, 1885.

Four months after date, for value received, I promise to pay to the order of James C. Armstrong eight thousand dollars, payable in U. S. gold coin, at the Commercial National Bank at Ogden, Utah, with interest at one per cent. per month, payable monthly,
17 from date hereof until paid, both before and after judgment, and if not paid at maturity ten per cent. additional as cost of collection.

M. H. BEARDSLEY.

And then and there delivered the same to James C. Armstrong, the plaintiff herein; that the defendant, Mills H. Beardsley, to secure the payment of the said principal sum of $8,000.00 and the interest thereon and the said cost of collection, as mentioned in said promissory note, according to the tenor thereof, did, at the same time and place, execute under his hand and seal and deliver to said James C. Armstrong, the plaintiff, a certain chattel mortgage bearing date on that day and conditioned for the payment of said sum of $8,000.00 and interest thereon at the rate and at the time and in the manner specified in said mortgage and in the said promissory note and according to the condition thereof, and also conditioned for the payment of said ten per cent. additional, as cost of collection, in case of default, as mentioned in said note & mortgage, and according to the conditions thereof, which said mortgage was duly verified, acknowledged, and certified, so as to entitle it to be recorded, and the same was afterwards, to wit, on the 17th day of January, 1885, duly recorded in the office of the county recorder of the
18 said county of Weber, Utah, in Book One of Chattel Mortgages, pages 43 & 44, a copy of which said mortgage, with all the indorsements thereon, is hereunto annexed, marked "Exhibit A," and made a part of this complaint. Said chattel mortgage, at the time it was so delivered to said James C. Armstrong, the plaintiff, affidavit of the parties thereto —, endorsed on said mortgage, a copy of which said affidavit is a part of said Exhibit "A" and is made a part of this complaint, and at the time said mortgage was so delivered it was accompanied by an acknowledgment thereof by said Mills H. Beardsley, endorsed on said mortgage, a copy of which said acknowledgment is a part of said Exhibit A and is made a part of this complaint.

Said defendant, Mills H. Beardsley, was a resident of said Weber county, in Utah Territory, at and during all the times herein mentioned, and the property mortgaged by said chattel mortgage to plaintiff was situated in Ogden, Weber county, Utah Territory, in the place described in said mortgage, at and during all the time herein mentioned, and the same was in the possession of said Mills H. Beardsley at and during all said times until the 13th day of August, 1885, when a portion thereof was taken from his possession, as hereinafter stated.

That the interest on the said [illegible]
19 tioned in said promissory note and in [illegible]
has been paid to the 14th day of July, 1885, [illegible]
the principal thereof, as of the date of May 20th, 1885, [illegible]
paid and the same have been indorsed on said note, and $7,500 of
the principal sum mentioned in said promissory note and mort-
gage, together with interest thereon at the rate of one per cent. per
month from the 14th day of July, 1885, and $780.00, said cost of
collection, still remains due and unpaid from said defendant, Mills
H. Beardsley, to said plaintiff, James C. Armstrong, and remained
so due and unpaid at the commencement of this action.

That the plaintiff is now the lawful owner and holder of said promissory note and said mortgage, and was such owner and holder thereof when this action was commenced.

That the defendants, John Broom & E. A. Whittaker, claim to have some interest in or claim upon said personal property or some part thereof as purchasers, mortgagees, judgment creditors, or otherwise, which claims are subsequent to and subject to the lien of the plaintiff's mortgage and have arisen since the commencement of this action.

That said John Broom's claim arose as follows: On the 13th day of August, 1885, a large and valuable portion of said mortgaged
property was taken from the possession of said Mills H.
20 Beardsley by E. A. Ireland, the United States marshal for
Utah Territory, on some pretended levy, and without the payment of said note or any part thereof on the 22nd day of August, 1885, sold and delivered to said John Broom by said E. A. Ireland at Ogden, Utah, and another large portion of said mortgaged property was then and there put and left in said Broom's possession by said Beardsley.

That the said portion of said mortgaged property so delivered by said Ireland & said Beardsley to said Broom comprises all the chattel property now used in carrying on the hotel business in the building in Ogden, Weber county, Utah, known as the Broom Hotel, and also the ice-house on said hotel premises; that the condition of said mortgage has not been performed and the property mortgaged thereby is probably insufficient to discharge the said mortgaged debt, and all that portion of the property covered by said chattel mortgage and described herein as situated on the premises known as the Broom Hotel building, in Ogden, Weber county, Utah, is now being used by the defendant, John Broom, in carr-ing on the business of keeping a hotel, to wit, the said Broom Hotel, and is being used and treated by said John Broom as his own, and has been mortgaged by him by a
chattel mortgage made and recorded in the recorder's office of
21 Weber county, Utah, since the commencement of this action, to
wit, on the 22nd day of August, 1885, to the defendant, E. A. Whittaker, and the said property is in danger of being materially injured & destroyed by its being so used in keeping a hotel by the defendant, John Broom, & is in danger of being removed and lost to the plaintiff by reason of said chattel mortgage so given on the same to defendant, E. A. Whittaker, by defendant, John Broom,

and that the said mortgaged property so described as being in said hotel building is the principal portion of the security for plaintiff's said claim; that the original complaint herein was duly filed in the clerk's office of this court, in said Weber county, on the 22nd day of July, 1885, by said James C. Armstrong, plaintiff, against said Mills H. Beardsley, defendant, to foreclose said mortgage; that said original complaint contained all the allegations respecting said note & mortgage and mortgaged property & the residence of said Beardsley hereinbefore contained and set forth and alleged as of any date prior to the commencement of this suit, as is shown by said original complaint, to which reference is now made, and the prayer thereof was to the effect following—that is to say: For judgment against said Mills H. Beardsley in favor of the plaintiff
22 for $7,800.00, with interest at the rate of one per cent. per month from the 14th day of July, 1885, and for costs of suit and for $780, attorney's fees, provided for in said mortgage and in said note mentioned as cost of collection, & for the usual decree for the sale of said mortgaged chattels according to law and the practice of this court, and for the application of the proceeds of such sale to the payment of the amount due to the plaintiff, and that defendant, Mills H. Beardsley, and also all persons claiming under him subsequent to the execution of said mortgage upon said chattels either as purchasers, incumbrance-s, or otherwise; might be barred and foreclosed of all claims, right, or equity of redemption in the said chattels so mortgaged and every part thereof, and that the plaintiff might have judgment and execution against said Mills H. Beardsley for any deficiency which might remain after applying all the proceeds of such sale properly applicable thereto to the satisfaction of said judgment, and that the plaintiff might have such further relief in the premises as to the court might seem meet and agreeable to equity, and particularly that a receiver might be appointed immediately by the court to take charge of and hold possession of said mortgaged property and preserve the same till it could be sold on the judgment order or decree of this court.

23 And plaintiff further alleges that on July 23rd, 1885, he caused a writ of summons to be duly issued out of the clerk's office of this court in said Weber county on said complaint and delivered the same to E. A. Ireland, United States marshall for Utah Territory, who, on the same day, in said Weber county, duly served said summons by delivering a true copy of said summons, attached to a certified copy of the said complaint, to said defendant, Mills H. Beardsley, personally, whereby this action on said original complaint became and was a pending action in this court in said Weber county from said 22nd day of July, 1885, the date of the filing of said complaint, to the present time.

That on the 11th day of August, 1885, the said plaintiff duly filed for record with the recorder of said Weber county a notice of the pending of said action, containing the names of the parties, the object of the action, and a description of the property affected thereby.

That at the time said Ireland so took possession of said goods and also at the time said Broom so received possession thereof—

that is to say, the goods now used in carrying on the [illegible] they and each of them had full notice & knowledge of all the plaintiff's rights in the premises and of all the facts herein stated
24 as having occurred prior to said 13th day of August, 1885.

Wherefore the plaintiff prays judgment against the said defendant, Mills H. Beardsley, for the sum of seven thousand eight hundred dollars, with interest at the rate of one per cent. per month from the 14th day of July, 1885, and for costs of suit and of $750.00, attorney's fees provided for in said mortgage and in said note and mentioned therein as costs of collection, and that the usual decree may be made for the sale of said mortgaged chattel property by the sheriff of said Weber county or other proper officer, according to the law and the practice of this court; that the proceeds of said sale may be applied in payment of the amount due to the plaintiff, and that said defendants, Mills H. Beardsley & E. A. Whittaker, John Broom, & all persons claiming under them or any of them subsequent to the execution of said mortgage upon said chattel property, by either as purcha'rs, incumbrance-s, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises and every part thereof, and that the said plaintiff may have judgment and execution against the said defendant, Mills H. Beardsley, for any deficiency which may remain after applying all the proceeds of said mortgaged property applicable to the satisfaction of said judgment.

That the plaintiff or any other parties to the suit may become
25 purchasers to said sale, that the sheriff or other proper officer execute a bill of sale to the purchaser, and that said purchaser or purchasers be let into the possession of the property on the purchase thereof, and that plaintiff may have such further relief in the premises as to the court may seem meet and agreeable to equity; and, further, that a receiver may be appointed to take said mortgaged property into his possession at once and preserve the same during the pendency of this suit and until the same shall be delivered under the decree or order of this court to said sheriff or other officer for sale under the decree to be entered as hereintofor-prayed for.

RANSFORD SMITH,
Attorney for Plaintiff.

"EXHIBIT 'A' TO AMENDED & SUPPLEMENTAL COMPLAINT."

This indenture, made the fourteenth day of January, in the year of our Lord one thousand eight hundred and eighty-five, between Mills H. Beardsley, a resident of Ogden, in the county of Weber and Territory of Utah, the party of the first part, and James C. Armstrong, of the same place, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of eight thousand dollars, lawful money of the United States of America, to him in hand paid, does grant, bargain, sell, convey,
26 and confirm unto the said party of the second part, his heirs and

assigns, the following-described personal property to wit: All the personal property and furniture & fixtures now used by said party of the first part in carr-ing on the hotel business in Ogden City, Utah, the same being in the Broom Hotel building, in said city, and being all the personal property in said building (except the property specifically exempt from execution and which does not have to be selected to be exempt; also the provisions and coal now supplied for running said hotel are to be and are excepted from the operation hereof); the ice in the ice-house on Wall street, in said city, being about 200 tons; also the ice-house behind the Broom Hotel, in said city; also one black horse called Jerry, one bay mare called Grace & her colt, 3 buggies, 3 sets of single harness, 1 set of double harness, and one two-seated sleigh.

Said property is situated at Ogden City, in the county of Weber and Territory of Utah, and is hereby warranted by the said party of the first part to be free and clear of all incumbrances or adverse claims and is to be and remain in the possession of the mortgagor.

This conveyance is intended as a mortgage to secure payment of a certain promissory note, bearing date 14th January, 1885, executed by said party of the first part for the sum of eight thousand dollars and payable to the order of the said party of the
27 second part four months after date, with interest thereon from date until paid, at the rate of one per cent. per month, payable monthly, and ten per cent. additional as costs of collection if not paid at maturity.

And these presents shall be void if such payment be made according to the tenor and effect thereof; but in case default be made in the payment of the principal or interest as in said note provided, or should any person remove or attempt to remove said property or any part thereof from the said county of Weber without first having obtained the written consent of the party of the second part hereto, his legal representatives or assigns, or should the party of the second part, his legal representatives or assigns, at any time deem — unsafe or insecure, then the said party of the second part, his legal representatives or assigns, are hereby empowered to take the said property or any part thereof, wherever the same may be found, and safely keep the same at the expense of the said party of the first part until the note secured hereby becomes due; and if it is not paid at maturity, then proceed to sell said property in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making said sale, and said 10 per cent. for attorneys' fees, and the overplus, if any there be, shall be paid
28 by the party making such sale on demand to the said party of the first part, his heirs or assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal on the day and year first above written.

M. H. BEARDSLEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
RANSFORD SMITH.
O. E. HILL.

TERRITORY OF UTAH, } ss:
County of Weber, }

Mills H. Beardsley, the party of the first part hereto, and James C. Armstrong, the party of the second part hereto, being first duly sworn, say that the within and foregoing mortgage is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the mortgagor.

M. H. BEARDSLEY.
J. C. ARMSTRONG.

Subscribed and sworn to before me this 14th day of January, 1885.

RANSFORD SMITH,
Notary Public.

[NOTARIAL SEAL.]

TERRITORY OF UTAH, } ss:
County of Weber, }

On this 14th day of January, A. D. one thousand eight hundred and eighty-five, before me, Ransford Smith, a notary public
29 in and for said county, personally appeared Mills H. Beardsley, personally known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the use and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office, in Ogden City, Utah Territory, the day and year in this certificate first above written.

RANSFORD SMITH,
Notary Public.

(Endorsed:) Chattel mortgage from M. H. Beardsley to James C. Armstrong, dated 14th January, 1885. Filed for record January 17th, A. D. 1885, at four o'clock p. m. Recorded in Book One of Chattel Mortgages, pages 43 & 44. F. J. Cannon, county recorder, by John Homer, deputy recorder.

TERRITORY OF UTAH, } ss:
County of Weber, }

James C. Armstrong, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing amended and supplemental complaint and knows the contents thereof, and that the same is true of his own knowledge, ex-
30 cept as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

J. C. ARMSTRONG.

Subscribed and sworn to before me this 21st day of September, 1885.

RANSFORD SMITH,
Notary Public.

[NOTARIAL SEAL.]

(Endorsed:) No. 697. District court, first judicial district, county of Weber. James C. Armstrong, plaintiff, *vs.* Mills H. Beardsley, John Broom, and E. A. Whittaker, defendants. Amended and supplemental complaint. Copy received Sept. 22, '85. Kimball and Heywood. By leave of court filed Sept. 21st, 1885. A. C. Emerson, clerk. Ransford Smith, attorney for plaintiff.

TERRITORY OF UTAH, } *ss:*
County of Weber, }

In the District Court of the 1st Judicial District.

JAMES C. ARMSTRONG, Pl'ff,
vs.
MILLS H. BEARDSLEY, JOHN BROOM, and E. A. WHITTAKER, Def'ts. } Stipulation.

It is stipulated that upon the demurrer to the complaint
31 in this action by the above-named defendants, Broom and Whittaker and Beardsley, in this court, and upon any appeal that may be taken on said demurrer, the facts hereinafter set forth may be taken as part of said complaint as fully as if alleged therein, to wit:

That on the 18th day of March, 1885, in an action then pending in this court wherein The Utah National Bank of Ogden, Utah, was plaintiff and the above-named defendant, Mills H. Beardsley, was defendant, a judgment was duly made, given, and entered in this court in favor of said plaintiff against said defendant for the sum of $3,166.00, to bear interest from said date at the rate of two per cent. per month, and for $26.75, costs of suit, except that said judgment was made, given, and entered by the clerk of this court on a default in vacation and without any act of any judge, the defendant having been regularly served with summons in said action, and the time for answering the complaint having expired, and the defendant not having answered or demurred to the complaint in said action.

That on the 12th day of August, A. D. 1885, an execution was issued out of this court upon said judgment, under the hand of the clerk of this court and the seal of this court, directed to the United States marshal for Utah Territory, and on the 13th day of said August was delivered to E. A. Ireland, the United States
32 marshal for Utah Territory, by which execution the said marshal was commanded to make the sums due on said judgment, with interest and costs and accruing costs, out of the personal property of said defendant Beardsley; and if sufficient personal property belonging to him could not be found, then out of the real property in said marshal's jurisdiction belonging to him, said Beardsley, on the day said judgment was docketed.

That on the 13th day of said August said judgment was wholly unpaid.

That on said 13th day of August, 1885, the said marshal, under and by virtue of said execution, levied upon and took into his pos-

session the property described in the schedule, hereunto attached and made a part hereof, being marked Exhibit "A," which property was then in the Broom Hotel building, in Ogden City, Utah, and in the possession of said defendant Beardsley; that on the 22nd day of August, 1885, the said marshal, after giving the notice required by law to be given, sold said property under and by virtue of said execution at public auction; that at said sale the said defendant Broom purchased the same (he being the highest bidder therefor) for the sum of $3,356.75, which sum he paid to the said marshal; that thereafter the said marshal paid over to said
33 The Utah National Bank the amount of it- said judgment, interest, and costs, and returned said execution fully satisfied.

That on the said 22nd day of August the said defendant Broom purchased of said defendant Beardsley all the personal property in Schedule B, hereunto attached and made part hereof, which property was then in said Broom Hotel building and in the possession of said defendant Beardsley and claimed by him as exempt from execution, at and for the sum of $500.00, which sum he, the said Broom, then and there paid him, and the said Beardsley then and there delivered said property to said Broom.

That on the 22nd day of August, A. D. 1885, after the purchases aforesaid the defendant, John Broom, borrowed of the defendant, E. A. Whittaker, the sum of $4,131.00, which money the said Whittaker then advanced and delivered to said Broom; that thereupon and in consideration thereof the said defendant Broom made and delivered to said Whittaker his promissory note of the date of August 22nd, 1885, whereby he promised to pay said Whittaker or order the said sum of *of* $4,131.00 ten months after date, with interest at the rate of 1½ per cent. per month, payable monthly, and to secure the payment of the same said Broom made, executed, and delivered to said Whittaker a chattel mortgage upon all the property purchased by him, Broom, as aforesaid, which
34 chattel mortgage was witnessed, executed, and acknowledged in conformity to an act of the Governor and Legislative Assembly of the Territory of Utah entitled "An act in relation to mortgages of personal property," approved March 13th, 1884, and the said mortgage was accompanied by the affidavit provided for in the 1st section of said act and was filed for record in the office of the recorder of Weber county, the said Broom being then and now a resident of said county.

RANSFORD SMITH &
SUTHERLAND & McBRIDE, *For Pl'ff.*
KIMBALL & HEYWOOD,
Att'ys for Broom & Whittaker.
P. H. EMERSON, *Att'y for M. H. Beardsley.*

Dated Oct. 3rd, 1885.

SCHEDULE EXHIBIT "A."

Office: 1 perforated wood-seat settee, 11 red cane-seat arm chairs, writing desk with mirror, clock, and advertising frame; 1 Hall

patent iron safe, 7 spittoons, 1 office clock, 1 large stove with zinc and pipe, 1 large map of Utah, 1 large map of world, 1 chandalier with lamps, 1 mat, 1 stool, 1 case of pigeon holes, 1 cane-seat chair, 1 baggage truck, 1 silver-plated card receiver, 1 call bell. Wash-room: 1 mirror, 1 bracket lamp with reflector, 2 towels with rollers, 2 maps of United States, 1 brush and comb, 3 soap dishes, 1 35 pitcher. Gent's room: 2 step-ladders, 2 coal scuttles, 2 sprinkling pots, 4 brooms, 1 mop, 1 piece hose, 3 pails, 2 tubs, 13 pitchers.

Dining-room: 7 tables, 5 side tables, 57 chairs, 1 mirror, 1 sideboard, 2 chandaliers, with 4 lamps each; 7 fly fans, 1 stove, with 12 joints Russian pipe; 7 castors, 15 china salts, 13 glass salts, 3 water pitchers, 48 goblets, 7 pickle castors, 17 silver-plated sugar bowls, 19 finger bowls, 5 fruit knives, 6 butter knives, 92 silver-plated teaspoons, 65 silver-plated knives, 51 silver-plated tablespoons, 75 silver-plated forks, 1 fancy water pitcher, 13 silver-plated knives, 15 silver-plated forks, 8 silver-plated tablespoons, 5 silver-plated teaspoons, 9 egg goblets, 3 spoon-holders, 1 linen basket, 7 silver-plated cream pitchers, 7 silver-plated butter dishes, 7 silver-plated cake stands, 7 silver-plated syrup pitchers, 6 toothpick-holders, 4 mustard-holders, 87 butter tips.

Kitchen, pantry, and dish-rooms: 8 jelly molds, 1 three-gal. stone jar, 1 zinc pail, 4 cooking buckets, 7 sauce pans, 5 spiders, 5 milk pans, 2 coal scuttles, 9 meat pans, 7 water buckets, 4 bushel baskets, 3 round pans, 6 square pans, 10 muffin irons, 80 pie plates, 11 square tins, 5 dish pans, 1 copper coffee boiler, 1 brass kettle, 1 stove, 2 kitchen tables, 1 high chair, 6 kitchen chairs, 5 lengths stovepipe, 1 ice-cream freezer, 1 pair scales, 1 granite pail, 1 tin wash-boiler, 1 q't and 1 p't granite measure, 7 water pitchers, 6 mustard bowls, 1 36 cream pitcher, 1 coal scuttle, 1 dust pan, 1 broom, 10 trays, 85 large platters, 13 bowls, 46 saucers, 104 cups, 126 side dishes, 118 small platters, 6 silver-plated teapots, 55 pie plates, 2 large bowls, 7 kitchen forks, 6 kitchen knives, 4 kitchen spoons, 40 sauce dishes, 7 celery dishes, 7 glass fruit dishes, 16 butter tips, 5 egg cups, 4 small coffee cups, 57 cream pitcher-, 1 china fruit dish, 1 salad bowl, 8 glass cake stands, 99 platters, 29 sides dishes, 1 Monitor range No. 19, 1 steamer, 1 boiler, 11 joints range pipe, 1 Mississippi range No. 26, 1 steam tank, 17 basting spoons, 2 skimmers, 6 ladles, 3 cullanders, 6 forks, 2 strainers, 2 egg dishes, 6 frying pans, 2 dripping pans, 1 potato pan, 1 stock boiler, 1 sieve, 1 sausage machine, 1 cleaver, 3 sauce pans, 1 scraper.

Room 18, parlor: 1 David O. Calder square piano, with cover and stools; 3 upholstered easy chairs, 1 camp chair, 1 settee, 1 stove, with zinc, 5 joints pipe; 1 Brussels carpet, 2 set- lace curtains, 2 sets fancy curtains, with hangings; 3 chair tidies, 1 mirror, 1 spittoon, 1 chandalier, with 3 lamps. Hall, 2nd floor: 1 hat rack, 3 mats, 3 nickel spittoons, 1 Brussels carpet, 2 chandeliers, with 3 lamps each, 1 hanging lamp, 1 rack, Brussels carpet in front stairs & rubb mat at foot.

1 panel bedstead, with springs, mattress, wool mattress, 2 sheets

pair blankets, 1 bed spread, 2 pillow slips; 1
37 stand, with wash bowl and pitcher; slop jar, 1
dish, 1 tumbler, 2 towels, 1 marble-top dressing case, 1
cover, 1 spittoon, 1 rack, 1 hanging lamp, 1 Brussels carpet, 2
curtains, with hangings.

Room- 12 & 13: 1 ash-panel bedstead with springs, mattress, and wool mattress; 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, & 2 pillow slips; 1 ash dressing case, 1 ash washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, 2 towels, 1 table cover, 1 sofa, 1 large easy chair, 1 black-walnut cane-seat chair, 1 stove, with zinc, 5-joint pipe, & 1 elbow; 1 spittoon, 1 hat rack, 2 tidies, 1 hanging lamp, 2 Brussels carpets, 1 match safe, 1 curtain.

Room 9: 1 towel rack, 2 towels, 1 hat rack, 1 Brussels carpet, 1 spittoon, 2 lace curtains with hangings, 1 match safe, 5 tidies.

Room 7: 1 walnut-panel bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, & 2 pillow slips; 1 washstand, with wash bowl & pitcher; 1 chamber, 1 soap dish, 1 tumbler, 1 towels, 1 mirror, 1 spittoon, 1 hat rack, 1 camp chair, 1 ingrain carpet, 1 curtain.

Room 5: 1 black-walnut panel bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, & 2 pillow slips; 1 washstand, with wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 chamber, 2 towels, 1 looking glass, 1 sofa, 1 small stand, 1 wooden chair, 1 camp chair, 1 ingrain carpet, 1 spittoon, 1 tidy.

38 Room 10, parlor: 1 upholstered easy chair, 1 chandelier, with 2 lamps; 1 Brussels carpet, 1 center table, 4 raw-silk curtains, 2 lambrequins & poles, 1 tidy.

Room- 14 & 15: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, & 2 pillow slips, 1 washstand, with wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 tumbler, 1 towel, 1 hat rack, 1 curtain, 2 black-walnut cane-seat chairs, 1 upholstered easy chair, 1 sofa, 2 woolen curtains, 2 lace curtains and fixtures, 1 ash dressing case, 1 match safe, 1 center table & cover, 2 tidies, 1 spittoon, 2 Brussels carpets, 1 hanging lamp.

Room- 16 & 17: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 bed spread, 2 pillows, & 2 pillow slips; 1 curtain, 1 washstand, with wash bowl & pitcher; 1 slop jar, 1 soap dish, 1 chamber, 1 tumbler, 3 towels, 2 black-walnut cane-seat chairs, 1 black-walnut cane-seat rocking chairs, 1 sofa, 1 stove, with zinc, 4 joints pipe, & 1 elbow; 1 lambrequin & pole, 1 hanging lamp, 1 center table & cover, 2 Brussels carpets, 1 match safe, 1 hat rack.

Room 27: 1 black-walnut panel bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow slips; 1 washstand, with wash bowl and pitcher; 1 looking glass, 1 soap dish, 1 hand lamp, 1 wooden chair, 1 ingrain carpet.

Rooms 21 & 22: 1 black-walnut panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 2 pillow slips, lilows, 1 bed spread; 1 marble-top washstand, with wash bowl & her; 2 pitchers, 1 slop jar, 1 mug, 1 vase, 4 towels, 1 soap dish,

1 tumbler, 1 hand lamp, 1 chamber, 1 curtain, 1 hat rack, 2 black-walnut cane-seat chairs, 1 marble-top dressing case, 1 center table & cover, 1 sofa, 1 black-walnut cane-seat rocking-chair, 1 upholstered rocking-chair, 3 tidies, 2 Brussels carpets, 1 match safe.

Rooms 19 & 20: 1 cherry-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, & 2 pillow slips; 1 marble-top dressing case, 1 marble-top washstand, with wash bowl and pitcher; 1 slop jar, 1 vase, 1 mug, 1 soap dish, 1 tumbler, 1 chamber, 3 towels, 1 spittoon, 1 hat rack, 1 curtain, 1 mat, 5 lace curtains & fixtures, 2 lambrequins & poles, 1 black-walnut cane-seat chair, 1 camp chair, 1 willow rocking chair, 1 upholstered easy chair, 1 hanging lamp, 1 stove, with zinc, 5 joints pipe, & 1 elbow; 2 Brussels carpets, 1 center table & cover.

Room- 25 & 26: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, & 2 pillow slips; 1 pair blankets, 1 washstand, with washbowl &
40 pitcher; 1 slop jar, 1 soap dish, 1 chamber, 1 goblet, 1 tumbler, 1 hanging lamp, 2 flat-irons, 1 hat rack, 2 black-walnut cane-seat chairs, 1 towel, 1 dressing case, 1 center table and cover, 1 sofa, 1 upholstered easy chair, 1 camp chair, 1 black-walnut cane-seat rocking chair, 1 spittoon, 1 stove, with zinc & 4 joints pipe, 1 elbow; 2 tidies, 1 match safe, 2 Brussels carpets.

Room- 23 & 24: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bedspread, 2 pillows, & 2 pillow slips; 1 curtain, 1 hat rack, 1 washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 soap dish, 3 towels, 1 hand lamp, 1 hanging lamp, 1 dressing case, 1 center table & cover, 1 sofa, 2 black-walnut cane-seat chairs, 1 black-walnut cane-seat rocking-chair, 1 stove, with zinc, 4 joints pipe, and elbow; 1 spittoon, 1 Brussels carpet, 1 ingrain carpet.

Rooms 59 & 60: 1 black-walnut bedstead, with spring mattrass, wool mattrass, 2 sheets, 1 pair blankets, 1 bed spread, 2 pil-
41 lows, and 2 pillow slips; 1 black-walnut marble-top washstand, with wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 tumbler, 1 chamber, 2 towels, 1 hat rack, 1 curtain, 2 black-walnut cane-seat chairs, 1 camp chair, 1 upholstered rocking chair, 1 upholstered easy chair, 1 black-walnut marble-top dressing case, 1 sofa, 1 cherry center table and cover, 3 napkins, 1 spittoon, 1 mat, 2 Brussels carpets, 2 lace curtains and fixtures, 1 lamberquin and pole, 1 hanging lamp, 1 match safe, 1 tidy.

Room 58: 1 ash-panel bedstead, with springs, mattrass, wool mattrass, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 tumbler, 1 chamber, 3 towels, 1 spittoon, 1 ash dressing case, 1 hat rack, 1 center table and cover, 1 black-walnut cane-seat chair, 1 Brussels carpet, 1 black-walnut cane-seat rocking chair, 1 hanging lamp.

Room 57: 1 ash-panel bedstead, with spring mattrass, wool mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, an-
42 pillow slips; 1 ash washstand, with wash bowl and pitch-
1 soap dish, 1 tumbler, 1 slop jar, 1 chamber, 3 towels, 1

dressing case, 1 hat rack, 2 black-walnut cane-seat chairs, 1 Brussels carpet, 1 curtain.

Room 61: 1 black-walnut bedstead, with springs, mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, 2 pillow slips; 1 black-walnut washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 tumbler, 1 soap dish, 2 towels, 1 looking glass, 1 curtain, 1 hat rack, 1 sofa, 1 napkin, 1 ingrain carpet.

Room 62: 1 black-walnut bedstead, with springs, mattress, 2 sheets, 1 pair blankets, 1 bed-spread, 2 pillows, and 2 pillow slips; 1 black-walnut washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, 1 looking glass, 1 stand, 1 hat rack, 1 curtain, 1 black-walnut cane-seat chair, 1 camp chair, 1 hand lamp, 1 ingrain carpet, 2 towels.

Room 56: 1 ash-panel bedstead, with springs, mattress,
43 wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, & 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, 3 towels, 1 ash dressing case, 1 spittoon, 1 hanging lamp, 1 sofa, 1 black-walnut cane-seat rocking chair, 1 black-walnut cane-seat chair, 1 camp chair, 1 center table and cover, 1 match safe, 1 Brussels carpet.

Room 55: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, & 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 chamber, 1 soap dish, 1 tumber, 1 slop jar, 1 ash dressing case, 4 towels, 2 black-walnut cane-seat chairs, 1 black-walnut cane-seat rocking chair, 1 ash center table, 1 spittoon, 1 hanging lamp, 1 hat rack, 1 Brussels carpet.

Room 53: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, & 2 pillow slips; 1 ash washstand, with wash bowl and pitcher, 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, 1 ash dressing case, 3 towels, 1 upholstered easy chair, 1 black-walnut cane-seat chair, 1 black-walnut
44 cane-seat rocking chair, 1 stove, with zinc, 5 joints of pipe, and 1 elbow; 2 lace curtains, with fixtures; 1 center table and cover, 1 ingrain carpet, 1 hanging lamp, 1 hat rack.

Rooms 51 & 52: 1 ash-panel bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, 1 ash dressing case, 3 towels, 1 hat rack, 2 black-walnut cane-seat chairs, 1 willow rocking chair, 1 upholstered easy chair, 1 center table and cover, 1 spittoon, 1 hanging lamp, 1 stove, with zinc, 5 joints pipe, and 1 elbow; 1 sofa, 2 Brussels carpets, 1 mat, 1 curtain, 2 napkins.

Room 48: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, & 2 pillow slips; 1 ash washstand, with wash bowl & pitcher; 1 chamber, 1 slop jar, 1 soap dish, 4 towels, 1 tumbler, 1 ash dressing case, 1 sofa, 1 black-walnut cane-seat rocking chair, 1 camp chair, 1 black-walnut center table, 1 hanging lamp, 1 spittoon, 1 Brussels carpet, 1 stove,
C with zinc, 4 joints pipe, & elbow; 1 napkin, 1 match safe.
1 w Room 47: 1 black-walnut bedstead, with springs, mat-

tress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, & 2 pillow slips; 1 black-walnut washstand, with wash bowl and pitcher; 1 chamber, 1 soap dish, 2 towels, 1 looking-glass, 1 black-walnut cane-seat chair, 1 hat rack, 1 curtain, 1 ingrain carpet.

Room 49: 1 ash panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bedspread, 2 pillows, & 2 pillow slips; 1 ash dressing case, 1 ash washstand, with wash bowl & pitcher; 1 soap dish, 1 tumbler, 1 chamber, 1 slop jar, 4 towels, 1 hand lamp, 1 hat rack, 1 black-walnut cane-seat rocking chair, 1 black-walnut cane-seat chair, 1 black-walnut center table, 1 spittoon, 1 ingrain carpet.

Room 50: 1 black-walnut bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bedspread, 2 pillows, & 2 pillow slips; 1 black-walnut washstand, with wash bowl & pitcher; 1 chamber, 1 soap dish, 1 looking glass, 1 hat rack, 1 black-walnut cane-seat chair, 1 curtain, 1 ingrain carpet.

Room 45: 1 walnut bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bedspread, 2 pillows, & 2 pillow slips; 1 washstand, with wash bowl & pitcher; 1 chamber, 1 soap dish, 1 looking glass, 1 curtain, 1 camp chair, 1 cotton carpet, 1 hat rack.

Room 46: 1 black-walnut bedstead, 1 single black-walnut bedstead, 2 sets springs, 2 mattresses, 4 sheets, 2 comforters, 4 pillows, 3 pillow slips, chamber, 1 hand lamp, 1 looking glass, 1 washstand, with wash bowl and pitcher; 1 soap dish, 1 curtain, 2 wooden chairs.

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Room 43: 1 spittoon, two wooden chairs, 1 stove, with zinc, 4 joints pipe, & elbow; 27 wooden horses, 1 lot boards, 1 coal scuttle.

Room 44: 1 black-walnut panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bedspread, 2 pillows, & 2 pillow slips; 1 black-walnut marble-top dressing case, 1 black-walnut marble-top washstand, with wash bowl & pitcher; 1 chamber, 1 slop jar, 1 vase, 1 mug, 1 tumbler, 1 soap dish, 2 towels, 1 stove, with zinc, 4 joints pipe, & elbow; 1 black-walnut center table and cover, 1 black-walnut cane-seat chair, 1 camp chair, 1 sofa, 1 hanging lamp, 1 spittoon, 1 willow rocking chair, 1 Brussels carpet, 1 match safe, hat rack.

Room 39: 1 black-walnut panel bedstead, with springs, mattress, 1 comforter, 2 sheets, 1 bedspread, 2 pillows, & 2 pillow slips; 1 black walnut washstand, with wash bowl & pitcher; 1 chamber, 1 soap dish, 2 towels, 2 black-walnut cane-seat chairs, 1 hat rack, 1 looking glass, 1 ingrain carpet, 1 curtain.

Room 38: 2 pine bedsteads, 2 sets springs, 2 mattresses, 6 comforters, 4 sheets, 4 pillows, 4 pillow slips, 2 bedspreads, 2 washstands, 1 wash bowl & pitcher, 1 soap dish, 1 tumbler, 1 chamber, 1 hand lamp, 2 wooden chairs, 1 clock, 1 piece carpet, 1 towel.

Room 35: 2 pine bedsteads, 2 sets springs, 2 mattresses, [illegible]; sheets, 6 comforters, 4 pillows, 3 pillow slips, 2 bedspreads, [illegible]er washstand, 1 wash bowl & pitcher, 1 soap dish, 1 wa[illegible] pitcher, 1 looking glass, 1 hand lamp, 2 wooden chairs, 1 piece [illegible]s, 1 pet, 3 towels.

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Room 36: 1 black-walnut bedstead, with springs, mattress, [illegible]

mattress, 2 sheets, 1 pair blankets, 1 bedspread, 2 pillows, & 2 pillow slips; 1 black-walnut washstand, with wash bowl & pitcher; 1 soap dish, 1 tumbler, 1 slop jar, 1 chamber, 1 looking glass, 3 black-walnut cane-seat chairs, 3 towels, 1 center table, 1 hand lamp, 1 curtain, 1 stove, with zinc, 4 joints pipe, & 1 elbow; 1 hat rack, 1 ingrain carpet.

Room 37: 1 black-walnut panel bedstead, with springs, mattress, 2 sheets, 1 pair blankets, 1 bedspread, 2 pillows, & 2 pillow slips; 1 black-walnut washstand, with wash bowl & pitcher; 1 slop jar, 3 towels, 1 soap dish, 1 sofa, 1 black-walnut center table, 1 hand lamp, 1 spittoon, 1 curtain, 1 looking glass, 1 hat rack, 1 black-walnut cane-seat chair, 1 tidy, 1 ingrain carpet.

Room 30: 1 ash panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bedstead, 2 pillows, & 2 pillow slips; 1 ash dressing case, 1 ash washstand, with wash bowl & pitcher; 1 soap dish, 1 slop jar, 1 chamber, 1 tumbler, 4 towels, 1 black-walnut center table, 2 black-walnut cane-seat chairs, 1 willow rocking chair, 1 spittoon, 1 hanging lamp, 1 stove, with 3 joints pipe & elbow; 1 piece oilcloth, 2 lambrequins & poles, 1 Brussels carpet.

48 Room 31: 1 ash panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bedspread, 2 pillows, & 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 soap dish, 1 slop jar, 1 chamber, 1 tumbler, 1 looking glass, 3 towels, 1 hand lamp, 1 black-walnut center table, 1 camp chair, 1 hat rack, 1 stove, with 4 joints pipe & 1 elbow; 1 ingrain carpet.

Room 32: 1 black-walnut folding bedspread, with 1 bar spring mattress, 1 wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, & 2 pillow slips; 1 washstand, with wash bowl & pitcher; 1 soap dish, 3 towels, 1 looking glass, 1 curtain, 1 hat rack, 2 cane-seat chairs, 1 chamber, ingrain carpet.

Room 29: 1 black-walnut panel bedstead, with wire spring mattress, Excelsior mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, & 2 pillow slips; 1 black-walnut washstand, with wash bowl & pitcher; 1 slop jar, 1 soap dish, 1 chamber, 1 tumbler, 3 towels, 1 looking glass, 2 black-walnut cane-seat chairs, 1 hand lamp, 1 stand, 1 Brussels carpet.

Room 34: 6 sample tables, 10 wooden horses, 1 hand lamp, 1 wall lamp, about 15 y'ds muslin.

Room 33: 4 sample tables, 11 wooden horses, 1 stove, with zinc, 4 joints pipe, & 1 elbow; 1 coal scuttle, 1 fire shovel, 1 looking glass, 1 wooden chair, 7 sheets.

Bath-room: 3 wooden chairs, 3 soap dishes, 3 hat racks, 2 towels, 3 mats, 3 pieces oilcloth, 1 piece carpet.

49 Hall, 3rd floor: 2 hanging lamps, 1 ingrain hall carpet, 3 nickel spittoons, 1 black-walnut table, 5 hand lamps, Brussels tair carpet on back stairs, 2 water pitchers, Brussels stair carpet on
30 ont stairs.

Hall closet: 1 lot old carpet, 3 brooms, 2 water pails, 2 slop pails,
2 p oal scuttles.
pit Room 28—linen room: 10 black waiters' coats, 12 white waiters'

coats, 17 comforters, 1 office table, 8 lace curtains, 122 towels, 234 napkins, 39 table cloths, 5 bed spreads, 63 sheets, 61 pillow slips, 4 white aprons, 1 carpet stretcher, 1 dinin-groom screen, 32 comforters, 4 pair blankets, 10 pillows, 1 hatchet, 2 wooden chairs, 8 clothes baskets.

Store-room, basement: 9 stoves, 35 joints pipe, 8 elbows, 2 coal scuttles, 2 chambers, 10 glass egg cups, 2 doz. cups, 2 doz. saucers, 46 plates, 160 side dishes, 3 large water pitchers, 1 roll wire screen, 145 dishes, 43 side dishes, 24 china egg cups, 29 platters, 42 lamp chimneys, 2 lantern globes, 1 coffee mill, No. 10; 8 pokers, 10 fire shovels, 10 flat irons, 4 wooden trays.

Laundry: 1 ironing stove, 1 length pipe, 1 elbow, 2 clothes wringers, 10 flat irons, 1 copper boiler, 1 washtub, 3 water buckets, 1 ironing board, 1 ironing table, 1 water pitcher, 2 wash boards.

50 SCHEDULE B.

Sofa	8 00
1 rug	2 00
1 carpet	3 50
1 bed-room set	35 00
1 dresser	8 00
1 folding bed	20 00
2 carpets	7 00
1 bed-room set	20 00
1 rocker	5 00
1 lounge	3 50
Lambrequin & poles	3 00
Lace curtains	2 00
1 stove	5 00
Chamber ware	2 00
Carpet	1 50
Bedding, springs, etc.	18 00
1 patent rocker	6 00
1 easy chair	5 50
1 " "	5 50
1 willow rocker	1 50
1 table	1 50
4 cane chairs	3 00
15 sauce dishes	25
14 saucers	25
6 egg cups	25
12 creams	30
12 butter cups	25
2 pitchers	75
6 bowls	75
2 platters	25
3 milk pans	50
1 lot tin pans	50
3 sauce pans	75
1 frying pan	25

1 tray		10
1 platter		50
1 celery holder		15
1 tea pot		25
1 table		2 75
Am't for'd	175	30
Am't for'd	175	30
1 high chair		75
1 table	3	00
1 p'r blankets	1	30
8 chairs	6	40
1 p'r blankets	2	00
1 "	3	00
4 sheets	1	40
6 pillow slips	1	00
11 towels	1	50
1 stove & pipe	8	00
1 cuspidore		25
Lace curtains	14	00
1 pier glass	25	00
1 cherry bed-room set	25	00
1 full china chamber set	3	50
51 Bedding	10	00
Hanging lamps	3	00
1 lounge	20	50
1 willow rocker	4	00
1 upholstered easy chair	5	00
1 parlor set, 4 pieces	45	00
1 cherry center table	2	00
1 cane chair		50
1 easy chair	7	00
1 willow rocker	2	50
1 book-case	15	00
Willis	25	
Camp chair	1	00
1 easy chair	7	00
1 table	6	00
1 rocker	2	50
1 easy chair	7	00
1 rocker	2	00
1 camp chair	2	00
1 table	2	00
1 easy chair	3	50
1 table	1	50
1 cane chair		75
For'd	270	85
Am't for'd	270	85
1 castor	2	50

1 pitcher	50
8 goblets	50
1 cream & sugar bowl	2 50
1 pickle caster	1 00
1 cream & sugar bowl	2 50
1 fancy pitcher	50
1 silver cake dish	10 50
1 silver butter dish & syrup jar	2 00
1 sideboard	18 00
2 salt-cellars, spoon holder, & pickle holder	50
1½ doz. plates	75
1½ "	75
2 glass fruit dishes	50
1 china "	25
9 side dishes	25
9 small platters	25
1 cane chair	75
1 camp chair	3 00
1 center table	4 00
1 camp chair	3 00
1 cane chair	75
1 cane rocker	4 00
1 casy chair	6 10
	$500 00

52 I hereby sell and transfer above-enumerated property to John Broom.

Ogden City, Aug. 22nd, 1885.

(Signed) M. H. BEARDSLEY.

Witness:

T. A. PERKINS.

(Endorsed:) Copy. No. 697. James C. Armstrong *vs.* M. H. Beardsley *et al.* Stipulation to amendment containing the supplemental amended complaint. Filed this 3rd day of October, A. D. 1885. A. C. Emerson, clerk, by Isaac Goldberg, deputy clerk. R. Smith & Sutherland & McBride, Kimball & H.

53 TERRITORY OF UTAH, } *ss:*
County of Weber, }

In the District Court, 1st Judicial District.

JAMES C. ARMSTRONG, Pl'ff, *vs.* MILLS H. BEARDSLEY, JOHN BROOM, and E. A. WHITTAKER, Def'ts. } Demurrer of Def'ts Broom and Whittaker to Amended and Sup. Complaint.

Come now the defendants, John Broom and E. A. Whittaker, above named, and, each demurring separately to the amended and supplemental complaint on file herein, alleges, each for himself and

not one for the other, that said amended and supplemental complaint does not state facts sufficient to constitute a cause of action against him.

KIMBALL & HEYWOOD,
Attorneys for Def'ts Broom & Whittaker.

(Endorsed:) No. 697. In the district court, 1st judicial district. James C. Armstrong *vs.* M. H. Beardsley *et al.* Demurrer of def'ts Broom & Whittaker to the amended and supplemental complaint. Due service of this demurrer is hereby acknowledged Oct. 1st, 1885. Ransford Smith, attorney for pl'ff. Filed Oct. 1st, 1885. A. C. Emerson, clerk, by Isaac Goldberg, deputy. Kimball & H., att'ys for said def'ts.

54

In the District Court, 1st Judicial District.

TERRITORY OF UTAH, *County of Weber*, } *ss:*

JAMES C. ARMSTRONG, Pl'ff,
vs.
MILLS H. BEARDSLEY, JOHN BROOM, and E. A. WHITTAKER, Def'ts.

Demurrer of Mills H. Beardsley to the Amended and Supplemental Complaint.

Comes now Mills H. Beardsley, one of the defendants above named, by P. H. Emerson, his attorney, and, demurring to the amended and supplemental complaint on file herein, alleges that said amended and supplemental complaint does not state facts sufficient to constitute a cause of action against him.

P. H. EMERSON,
Att'y for Def't Beardsley,
By KIMBALL & HEYWOOD.

(Endorsed:) No. 697. In the district court, 1st judicial district. James C. Armstrong *vs.* Mills H. Beardsley *et al.* Demurrer of def't Beardsley to amended and supplemental complaint. Due service of this demurrer is hereby acknowledged Oct. 1st, '85. Ransford Smith, att'y for plaintiff. Filed Oct. 1st, 1885. A. C. Emerson, clerk, by Isaac Goldberg, deputy. P. H. Emerson, att'y for said def't.

55

In the District Court of the First Judicial District of Utah Territory, Sitting in Weber County.

JAMES C. ARMSTRONG, Plaintiff,
vs.
MILLS H. BEARDSLEY, JOHN BROOM, and E. A. WHITTAKER, Defendants.

Order Overruling Demurrer.

This cause having been heretofore heard upon the demurrer of the defendants, John Broom and E. A. Whittaker, to the amended and supplemental complaint of the plaintiff herein and upon the

demurrer of the defendant, Mills H. Beardsley, to said complaint, and the same having been argued by counsel and submitted to the court and by the court taken under advisement, the court being now fully advised in the premises, it is considered by the court that neither of said demurrer- is well taken, and that the same ought to be, and they both are hereby, overruled.

Nov. 18th, 1885.

ORLANDO W. POWERS, *Judge.*

(Endorsed:) No. 697. James C. Armstrong *vs.* Mills H. Beardsley *et al.*

56 *Order Overruling Demurrer to Amended & Supplemental Complaint.*

At a district court of the first judicial district of the Territory of Utah, county of Weber, held at the court-house in Ogden City, county of Weber, on the 17th day of November, A. D. 1885.

Present: The Hon. Orlando W. Powers, judge of the first judicial district.

J. C. ARMSTRONG, Plaintiff,
vs.
MILLS H. BEARDSLEY, JOHN BROOM, and E. A. WHITTAKER, Defendants.
} Order Overruling Demurrer.

This cause having been heretofore heard upon the demurrer of the defendants, John Broom and E. A. Whittaker, to the amended and supplemental complaint of the plaintiff herein and upon the demurrer of the defendant, Mills H. Beardsley, to said complaint, and the same having been argued by counsel and submitted to the court and by the court taken under advisement, the court being now fully advised in the premises, it is considered by the court that neither of said demurrer- is well taken, and that the same ought to be, and both are hereby, overruled.

It is further ordered that deft's Broom and Whittaker have 20 days to file their answer herein.

57 I, T. A. Perkins, clerk of the district court of the first judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court this 24th day of June, 1886.

[SEAL.] T. A. PERKINS, *Clerk.*

(Endorsed:) No. 697. District court, first judicial district, county of Weber. James C. Armstrong, plaintiff, against M. H. Beardsley *et al.*, defendants. Certified copy of order overruling demurrer. Entered Nov. 17th, 1885.

TERRITORY OF UTAH, } ss:
County of Weber, }

In the District Court, 1st Judicial District.

JAMES C. ARMSTRONG, Plaintiff, } Separate Answer of E. A. Whittaker and John Broom to the Amended and Supplemental Complaint.
vs
MILLS H. BEARDSLEY, JOHN BROOM, and E. A. WHITTAKER, Def'ts.

Come now the above-named defendants, John Broom and E. A. Whittaker, and for their separate answer to the amended and supplemental complaint on file herein—

Admit the execution and delivery of the note and mortgage
58 mentioned and set forth in the complaint, but as to the following allegations of said complaint, to wit, "And $7,800 of the principal sum mentioned in said promissory note & mortgage, together with interest thereon, at the rate of one per cent. per month, from the 14th day of July, 1885, and $780, said cost of collection, still remains due and unpaid from said defendant, Mills H. Beardsley, to said plaintiff, James C. Armstrong, and rema-nded so due and unpaid at the commencement of this action," defendants allege that they have no information or belief sufficient to enable them to answer them, and therefore they deny each and every of them. Defendants, upon their information and belief, deny that the plaintiff is now the lawful owner or holder of said promissory note or mortgage, or that he was such owner or holder thereof when this action was commenced; on the contrary, defendants, upon their information and belief, allege that the Commercial National Bank of Ogden was at the commencement of this action and is yet the owner and holder of said note and mortgage. Defendants admit that they claim an interest in the personal property described in the said complaint, to wit, that portion thereof described in Schedules "A & B," attached to the stipulation of the parties, filed in this action October 3rd, 1885, which schedules are hereby referred to as
a part of this answer; that they claim said property as fol-
59 lows: The said Broom as a purchaser thereof, as alleged in the second part of this answer and not otherwise; the said Whittaker as a mortgagee, as alleged in the second part of this answer and not otherwise, which second part of this answer is hereby referred to and made a part hereof; but defendants deny that their said claims are subsequent to or subject to the lien of plaintiff's mortgage; they admit that their said claims arose subsequent to the commencement of this suit originally, but at a time when more than ninety days had elapsed after the maturity of the note secured by said mortgage.

Defendants deny that they had notice of all or any of the rights of the plaintiff or of said mortgage or of the commencement of this action against the defendant Beardsley until after the expiration of ninety days from and after the maturity of the note secured by said mortgage, and not then until after the levy by the United States marshal upon the property herein in Schedule "A" described.

Defendants deny that on the 13th day of August, 1885, to wit, at the time of the levy by said marshal, they had full notice or any notice or knowledge of all or any of the facts in said complaint alleged as having occurred prior to August 13th, 1885.

2nd. Said defendants, further answering said complaint
59½ and for defence thereto, allege that on the 29th day of December, 1884, the defendant, Mills H. Beardsley, was indebted to the Utah National Bank of Ogden, a corporation organized and existing under and by virtue of the laws of the United States, in the sum of four (4) thousand dollars for money before that time lent and advanced to him by said bank at his request; that on said 29th day of December the said defendant, Mills H. Beardsley, in consideration of said money so lent and advanced him as aforesaid, made and delivered to said bank his certain promissory note in the words and figures following, to wit:

$4,000. OGDEN, UTAH, *December 29th*, 1884.

On the 29th day of January, 1885, for value received, I promise to pay to the Utah National Bank of Ogden, or order, four thousand dollars, payable in U. S. gold coin, at the Utah National Bank of Ogden, with interest, at the rate of two per cent. per month, from maturity until paid, both before and after judgment, and if not paid at maturity ten per cent. additional for cost of collection.

M. H. BEARDSLEY.

That on the 17th day of February, 1885, there remained due and unpaid on said promissory note from said defendant Beards-
60 ley the sum of $2,800 principal, together with interest thereon, at the rate of two per cent. per month, from January 29th, 1885, and ten per cent. additional for costs of collection.

That on said 17th day of February, 1885, the said Utah National Bank of Ogden commenced an action in this court on said promissory note against the said defendant Beardsley to recover of and from him the amount so due and unpaid as aforesaid on said note; that thereafter, to wit, on March 18th, 1885, in said action in this court, judgment was duly made, given, and entered in favor of said bank and against said defendant Beardsley for $3,166.00, to bear interest from said date at the rate of two per cent. per month, and for $26.75 costs of suit, which judgment was docketed in this court on said day; that thereafter, to wit, on the 12th day of August, A. D. 1885, an execution was duly issued out of this court upon said judgment under the hands of clerk of this court and the seal thereof, directed to the United States marshal for this Territory, and on the 13th day of said August was delivered to E. A. Ireland, then and now the United States marshal for this Territory, by which execution the said marshal was commanded to make the sums due on said execution with interest and costs and accruing costs, out of the personal property of defendant Beardsley, and if sufficient
61 personal property could not be found belonging to him, then out of the real property in said marshal'- jurisdiction belonging to him, said Beardsley, on the day said judgment was docketed.

That on the said 13th day of August, 1885, the said judgment and execution being then in full force and unsatisfied, the said marshal, under and by virtue of said execution, levied upon and took into his possession and custody the personal property described in Schedule "A," attached to the stipulation of the parties filed in this action on October 3rd, 1885, which schedule is hereby referred to and made a part of this answer; that said property was on said day in the Broom Hotel, in Ogden city, and in the possession and under the control of said defendant Beardsley; that thereafter, to wit, on the 22nd day of August, 1885, said marshal, after giving the notice required to be given in such cases, sold said property under and by virtue of said execution at public auction; that at said sale said defendant, John Broom, purchased said property (he being the highest bidder therefor) at and for the sum and price of $3,856.75, which sum and price he then and there paid to said marshal; that thereafter and before the expiration of sixty days from the date of said execution said marshal paid to the said Utah National Bank of Ogden the full amount due on said execution and returned the same into this court fully satisfied; that immediately upon said sale the said marshal delivered said property
62 to the defendant Broom; that at the time of said sale and purchase as aforesaid these defendants had no notice of the pendency of this action against the said defendant Beardsley or of the execution and recording of the mortgage to plaintiff upon said property; that at the time of said sale and purchase more than ninety days had elapsed after the maturity of the note secured by said mortgage set forth in the complaint herein.

That on the 22nd day of August, 1885, the said defendant Beardsley was in possession of and had control of the personal property described in Schedule "B," attached to the stipulation aforesaid, which schedule is hereby referred to and made a part of this answer, and claimed the same as exempt from levy and sale under execution; that said property was then and there exempt from sale under execution; that on said day said defendant Broom purchased the same of defendant Beardsley and paid him therefor the sum and price of $500.00, and the said defendant Beardsley then and there delivered said property to said defendant Broom; that the defendant, John Broom, is now the owner and entitled to the possession of all the property aforesaid.

That on the said 22nd day of August, A. D. 1885, the said defendant, E. A. Whittaker, lent and advanced the said defendant, John Broom, at his request, the sum of $4,131.00; that thereupon
63 and in consideration of said money so lent and advanced to him, said defendant, John Broom, made and delivered to said defendant, E. A. Whittaker, his certain promissory note, bearing date on said day, whereby he promised to pay said defendant, E. A. Whittaker, or order, the sum of $4,131.00 ten months after date, with interest at the rate of one and one-half per cent. per month from date, and, if not paid at maturity, ten per cent. additional for cost of collection; and that the said defendant, John Broom, did on said 22nd day of August, 1885, to secure the payment of said note according to the

tenor thereof, make, execute, and deliver to said defendant Whittaker a certain chattel mortgage, bearing date on said day, whereby he conveyed to said defendant Whittaker all of the property described in said Schedules "A & B;" which said mortgage was conditioned to be void upon the payment of said promissory note according to its tenor and effect; that said mortgage provided that said property should remain in the possession of said defendant Broom, and was accompanied by the affidavit of these defendants that the same was made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the said defendant, John Broom; that said mortgage was duly witnessed, verified, and acknowledged so as to entitle it to be recorded,
64 and was on said day duly filed for record in the office of the recorder of Weber county, Utah, that being the county wherein the said defendant Broom resided; that at the time the said defendant Whittaker so lent and advanced said money and at the time of the execution and delivery of said note and mortgage as aforesaid the said property was in the possession of said defendant Broom and under his control.

That the foregoing and none other are the claims and interests of these defendants in the property described in the complaint.

3rd. That said defendants, further answering the said complaint and for a further defense thereto, allege that on the 29th day of December, A. D. 1884, the defendant, Mills H. Beardsley, made, executed, and delivered to the Utah National Bank of Ogden, a corporation organized and existing under the laws of the United States and engaged in the business of banking in Ogden city, Utah, his certain promissory note, bearing date on that day, whereby he promised, for value received, to pay the said bank or its order, on the 29th day of January, 1885, the sum of four thousand dollars, payable in U. S. gold coin at said bank, with interest thereon at the rate of two per cent. per month after maturity, and, if not paid at maturity, ten per cent. additional for costs of collection; that on the 17th day of February, 1885, there was due and unpaid on said note
65 from said defendant Beardsley to said bank the sum of $2,800.00, together with interest at the rate of two per cent. per month from January 29th, 1885, and ten per cent. cost of collection; that on said day the said bank commenced an action in this court against said defendant Beardsley upon said note to recover said sum, interests, and costs; that on the 18th day of March, 1885, in said action in this court a judgment was duly given, made, entered, and docketed in favor of said bank and against said defendant Beardsley for the sum of $3,166.00 damages and $28.75 costs; that on the 12th day of August, 1885, a writ of execution was duly issued out of this court upon said judgment, in due form of law, directed to the United States marshal for this Territory, and was, on the 13th day of August, A. D. 1885, delivered to E. A. Ireland, then and now the United States marshal for this Territory, which execution commanded the said marshal to make the sum due on said judgment and execution out of the personal property of said defendant Beardsley, and, if sufficient personal property could not

be found belonging to him, then out of the real property in said marshal's jurisdiction belonging to said defendant Beardsley on the day said judgment was docketed; that on the 18th day of August, 1885, by virtue of the said execution, the said marshal did levy upon and take into his possession and custody the personal property described in Schedule "A," attached to the stipulation of the parties, filed herein on October 3rd, 1885, and as a part of the com-
66 plaint, which schedule is hereby referred to and made a part of this answer; that said property was then in the possession and under the control of said Beardsley, and, as these defendants are informed and believe and so charge the fact to be, was the property of said Beardsley; that on the 22nd day of August, after giving and posting the notices and doing all the things required by law, the said marshal did legally sell the said property at public auction to the defendant John Broom for the sum and price of $3,856,75, he being the highest bidder therefor and that being the highest price bid; that said defendant Broom then and there paid the said marshal said sum of money and the said marshal then and there delivered said property to said defendant Broom.

That, as defendants are informed and believe and so charge the truth to be, the said defendant Beardsley was, on the 14th day of January, A. D. 1885, carrying on the business of a hotel-keeper at Ogden, Utah, and the property aforesaid was the furniture, fixtures, and necessary property used in said hotel business, and was all the property possessed by said defendant Beardsley not exempt from levy and sale under execution. These defendants allege, upon their information and belief, that said defendant Beardsley was losing money in his said hotel business and knew that he would be unable to meet the said indebtedness to said bank at its maturity,
67 and with a view to conceal his said property from said bank and prevent it being made available for the payment of said indebtedness for which the said judgment was rendered, and to hinder and delay the said bank in the collection of its said debt and demands, he made, executed, and delivered to the plaintiff the note and the mortgage described in the complaint; and these defendants, upon their information and belief, allege that said note and mortgage was without any consideration moving from said plaintiff or any other person, and that said plaintiff took said note and mortgage knowing of said indebtedness of said defendant Beardsley to said bank and to enable said Beardsley to continue the said hotel business without molestation from said bank by reason of said indebtedness. These defendants, upon their information and belief, further allege that this action was commenced originally against the said defendant Beardsley to perpetuate the said mortgage, with the intent to prevent a levy on said property by said bank under its said judgment and execution, and to protect said property from sale under execution, and that after summons was served upon said defendant Beardsley, as in said complaint alleged, and notwithstanding the facts that said defendant Beardsley failed to answer or demur to said complaint within the time required by

law, and that this court was at said time in session, the said
68 plaintiff failed and refused to take his judgment on said note and mortgage, but, on the contrary, as these defendants are informed and believe and so charge the facts to be, agreed to and with said Beardsley that he would do nothing in said suit until the November (the present) term of this court, all of which was with intent, as these defendants are informed and believe and so charge the truth to be, to hinder and delay the said bank in the collection of its said indebtedness and judgment.

Wherefore these defendants demand judgment—

1st. That said plaintiff take nothing against them by his said complaint, and that they have and recover their costs in this behalf incurred.

2nd. That said mortgage of plaintiff be declared and adjudged to be null and void as to these defendants, and for all other proper relief.

JAMES N. KIMBALL,
A. R. HEYWOOD,
Att'ys for Defendants Broom & Whittaker.

69 TERRITORY OF UTAH, } ss:
County of Weber, }

John Broom, being duly sworn, deposes and says that he is one of the defendants named in the foregoing answer, and that he makes this verification on behalf of both of said defendants; that he has heard the foregoing answer read and knows its contents; that the same is true of his own knowledge, except as to the matters therein alleged on information or belief, and that as to those matters he believes it to be true.

JOHN BROOM.

Subscribed and sworn to Dec. 22nd, 1885, before me—
JAMES N. KIMBALL,
[SEAL.] *Notary Public.*

(Endorsed:) No. 769. In the district court, 1st judicial district. James C. Armstrong *vs.* Mills H. Beardsley *et al.* Answer of defendant- Broom & Whittaker. Due service of this answer is hereby acknowledged December 22nd, 1885. Ransford Smith & J. G. Sutherland, att'ys for pl'ff. Filed Dec. 22nd, 1885. A. C. Emerson, clerk. James N. Kimball, A. R. Heywood, att'ys for said def'ts.

In the District Court of the First Judicial District of Utah Territory.

JAMES C. ARMSTRONG, Plaintiff,
vs
MILLS H. BEARDSLEY, JOHN BROOM, and E. A. WHITTAKER, Defendants. } Finding and Decision.

70 This cause having been heretofore admitted to the court for decision upon the amended and supplemental complaint

of the plaintiff, the answer of the defendants, John Broom and E. A. Whittaker, thereto, and the other pleadings files, and on the evidence produced on both sides, and arguments of counsel having been heard upon both sides on the trial thereof, and the court being now fully advised, finds the following facts:

That the defendant, Mills H. Beardsley, on the 14th of January, 1885, made and delivered to the plaintiff, at Ogden, Weber county, Utah, the promissory note for $8,000.00, set forth — the amended and supplemental complaint filed in this action.

That said note bears date January 14th, 1885, and was payable four months after date.

That the same was so made and delivered for full value received by said Beardsley.

That said Beardsley, to secure the payment of said note and the interest thereon and the costs of collection mentioned therein according to the terms of said note, did at the same time and place execute under his hand & seal and deliver to said Armstrong, the plaintiff, the chattel mortgage bearing date on that day and set forth in said amended and supplemental complaint, which said mortgage was duly verified, acknowledged, and certified so as to entitle it to be recorded, and the same was afterwards, on the 17th day — January, 1885, duly recorded in the office of the county recorder of Weber county, Utah.

71 Said defendant, Beardsley, was a resident of Weber county, Utah, at and during all the time mentioned in said amended & supplemental complaint, and the property mortgaged by said chattel mortgage to plaintiff was situated in Ogden, Weber county, Utah, in the place described in said mortgage, at and during all the times mentioned in said amended and supplemental complaint, and the same was in the possession of said Beardsley at and during all said times until the 13th day of August, 1885.

That there had been paid on said note and mortgage at the time of the filing of the original complaint herein the interest on said note to July 14th, 1885, and $200.00 of the principal sum or sums had been *been* paid thereon at the time of filing herein of said amended and supplemental complaint; that there was due at the commencement of this action, and the same remained due at the filing of said amended & supplemental complaint, $7,800.00 of the principal sum mentioned in said note, and interest thereon at the rate of one per cent. per month, to be computed from July 14th, 1885, and $780.00, the cost of collection, provided for in said note and mortgage; which sums were then due from defendant Beardsley to plaintiff Armstrong.

That the plaintiff is the lawful owner and holder of said note and mortgage, and was such owner and holder thereof when this action was commenced.

72 That the claims of said defendants, Broom and Whittaker, arose since the commencement of this action.

That the condition of said chattel mortgage had not been performed at the commencement of this suit nor at any time since, and

the property mortgaged thereby is probably insufficient to discharge said mortgage debt.

That the original complaint herein was duly filed in the clerk's office of this court, in said Weber county, only July 22nd, 1885, by said Armstrong, plaintiff, against Beardsley, defendant, to foreclose said mortgage; that the prayer *or* said original complaint is as stated in said amended & supplemental complaint.

That on July 23rd, 1885, plaintiff caused a writ of summons to be duly issued out of the clerk's office of this court in said Weber county on said complaint, which was on the same day duly served on said defendant Beardsley in Weber county, Utah, and the same, with the service indorsed on it, was duly returned to said clerk's office and duly filed on return, July 30th, 1885.

That the said The Commercial National Bank of Ogden was not at the commencement of this action and has not since been and is not now the owner or holder nor owner and holder of said note & mortgage or of either of them.

That the said defendant-, John Broom & E. A. Whitaker,
73 have no interest nor has either of them any interest in the personal property described in said complaint and in Schedule "A" of the stipulation of the parties, filed in this action Oct. 3rd, A. D. 1885, except such interest as is subject to the claim and lien of said plaintiff by virtue of said chattel mortgage & of the proceedings in this suit.

That the said purchase of said Broom of said property described in said Schedule "A" was subject to the lien of the said chattel mortgage of said plaintiff, James C. Armstrong.

That the said chattel mortgage of the said Whittaker is and was taken subject to the said lien of the plaintiff's said chattel mortgage.

That the said claims of said defendants Broom and Whitaker arose subsequently to the commencement of this suit, but prior to the filing of said amended and supplemental complaint, and at a time when more than 90 days had expired after the maturity of the said note, to wit, the note secured by plaintiff's said chattel mortgage, but their said claims, all and each of them, had their origin pending this suit, and with full notice and knowledge thereof and of plaintiff's said claim in his said note and mortgage.

That said defendants Broom & Whittaker each had actual notice of all the rights of the plaintiff and of plaintiff's said mort-
74 gage and of the commencement of this suit prior to their or either of them acquiring any rights to or interest in said property described in said Schedule "A," and defendant Broom had such notice prior to the expiration of said 90 days, and that they each had constructive notice thereof from the filing of record of plaintiff's chattel mortgage and each had constructive notice of the commencement of this suit; that said defendants Broom and Whittaker on the 13th day of Aug., 1885, to wit, at the time of the levy of said marshal, each had full notice and knowledge of all the facts in said amended complaint alleged as having occurred prior to Aug. 13th, 1885; that the defendant Mills H. Beardsley was indebted to the Utah National Bank, a corporation organized, as alleged in the

answer, in the sum of $4,000.00 on the 29th day of December, 1884, for money before that time advanced to him by said bank.

That on the 29th Dec., 1884, said Beardsley gave to said Utah National Bank his note in the words and figures set forth in the 2nd defense of said defendants in their said answer.

That on the 17th day of February, 1885, there was due and unpaid on said note from said Beardsley to said Utah National Bank $2,800.00 and interest, at two per cent. a month, from Jan'y 29th, 1885, and ten per cent. additional for costs of collection.

75 That on Feb. 17th, 1885, said Utah National Bank commenced an action in this court on said note against said defendant Beardsley on said note, and on March 18th, 1885, in said court judgment was duly given and made and entered in favor of said bank against said Beardsley for $3,166.00, to bear interest at the rate of two per cent. a month from the date of said judgment, and for $26.75 costs of suit, which judgment was docketed on said day, except, however, that there was at that time, to wit, at the time said judgment was given and made and docketed, no judge in said district nor any judge assigned thereto nor authorized to act therein, and no term of court was then in session in this district, and said judgment was given, made, and entered by the clerk of said court only and alone in vacation.

That Phillip H. Emerson had been judge of said court, but had resigned, and his resignation had been accepted and took effect March 9, 1885, and no successor had been appointed and no judge had been assigned to take his place when said judgment was so given, made, and entered; that an execution was issued in due form out of this court on said judgment, under the hand of the clerk of this court and the seal thereof, directed to the United States marshal for this Territory, and on Aug. 13th, 1885, was

76 delivered to said marshal, which execution was in form according to the statutory requirements as against the said Beardsley.

That on the 13th day of August, 1885, the said judgment and execution being then in full force so far as the same could be valid under these findings, and the same being unsatisfied, the said marshal, under and by virtue of said execution, levied upon and took into his possession and custody the personal property described in Schedule "A" attached to said stipulation, filed herein Oct. 3rd 1885.

Said property was on said day in the Broom Hotel, in Ogden city, and in the possession and under the control of said defendant Beardsley; that thereafter, to wit, on the 22nd day of August, 1885, said marshal, after giving notice required to be given in such cases, sold said property, under and by virtue of said execution, at public auction.

That said plaintiff immediately after said levy and on the same day thereof, and while said marshal was making an inventory of said property, protested against the same to said marshal and informed him of the pendency of this suit and of the plaintiff's claim

therein, and demanded that his said claim and demand be paid or said levy released, which said marshal refused to do.

77 That at said sale said defendant, John Broom, purchased said property, he being the highest bidder therefor, at and for $3,856.75, which he then and there paid to said marshal; that prior to said purchase by said Broom plaintiff informed him of the pendency of said suit and of all his rights in the premises; that said marshal paid to said Utah National Bank of Ogden the full amount due on said execution and returned the same into this court fully satisfied during the life of said execution; that immediately upon said sale the said marshal delivered said property to said defendant Broom; that at the time of said sale and purchase aforesaid the said Broom & Whittaker each had notice of the pendency of this action against said defendant Beardsley and notice of the execution and recording of said chattel mortgage to plaintiff upon said property.

That at the time of said sale more than 90 days had elapsed after the maturity of the note secured by said mortgage set forth in the complaint herein.

That on Aug. 22nd, 1885, defendant Beardsley was in possession of and had the control of the personal property described in Schedule "B" attached to said stipulation, and claimed the same as exempt from levy and sale under execution.

78 That said property was then and there exempt from sale under execution; that on said day said defendant Broom purchased the same of defendant Beardsley and paid him therefor $500.00, and said Beardsley then and there delivered said property to said Broom; that defendant Broom is now the owner and entitled to the possession of all said property mentioned in Schedule "B" so purchased by him.

That on Aug. 22nd, 1885, said E. A. Whittaker lent to John Broom $4,131.00, and in consideration thereof said Broom made and delivered to Whittaker his promissory note, dated said day, whereby he promised to pay to said Whittaker or order $4,131.00 in ten months after date, with interest at the rate of 1½ per cent. per month from date, and if not paid at maturity 10 per cent. additional as cost of collection; and said Broom on 22nd day of August, 1885, to secure the payment of said note, made and delivered to said Whittaker a chattel mortgage of that date upon all the property described in said Schedule "A" & "B," which mortgage was to be void on the payment of said note, and the property mortgaged was to remain in the possession of said Broom and was accompanied by the affidavit of said Broom & Whittaker that the same was made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of said Broom; said mortgage was duly witnessed, verified, & acknowledged, so as to

79 enable it to be recorded, and was on said day duly recorded in the office of the recorder of Weber county, Utah, in which county Broom resided; that at the time said Whitaker so lent said money and said note and mortgage were so given to him by said Broom said Broom was in the possession & had control of said property by reason of the premises.

That the foregoing and none other are the basis of the claims of said Broom & Whitaker mentioned in the said amended complaint.

That on the 14th of January, A. D. 1885, said Beardsley was carrying on the business of a hotel-keeper at Ogden city, Utah, & the property set forth in said Schedule "A" was the furniture used by him in said hotel business, & said Beardsley was not then losing money in his said business; that he did not then know that he would be unable to meet his said indebtedness to said Utah National Bank of Ogden at its maturity.

That he did not, with a view to conceal his said property from said Utah National Bank or to prevent its being made available for the payment of said indebtedness to said Utah National Bank or to hinder or delay the said bank in the collection of its said debt, make, execute, or deliver to the plaintiff the note *the note* or mortgage or either of them described in the complaint.

That said note and mortgage were upon full consideration moving from said plaintiff.

80 That said plaintiff did take said note, and knowing of said indebtedness of said defendant Beardsley to said Utah National Bank, but did not take them or either of them to enable said Beardsley to continue said hotel business without molestation from said bank by reason of said indebtedness, but the same were taken in good faith; that this action was not commenced to perpetuate plaintiff's mortgage with the intent to prevent a levy on said property by said bank under its said judgment nor to protect said property from sale under execution; that after summons was served on defendant Beardsley & the said Beardsley was in default in this action the plaintiff failed, but did not refuse, to take his judgment on his said note and mortgage, which failure was for one day and for a reasonable excuse, to wit, that counsel for Armstrong was informed that court would adjourn for several months three days sooner than it did actually adjourn; that plaintiff did not at any time agree with said Beardsley that he would do nothing in said suit until the November, 1885, term of this court; that the plaintiff has done nothing with intent to hinder or delay said Utah National Bank or any other creditor of said Beardsley in the collection of its or their indebtedness against him.

That of property outside of the said schedule included in

81 said chattel mortgage, to wit, 1 buggy and set of harness, 1 phaeton, harness, & horse, Jerry; 1 two-seated carriage, sleigh and harness, 1 lot of ice and 1 set of single harness, the plaintiff has made since the filing of said amended & supplemental complaint the sum of $862.15, which should be credited upon his claim as of the date of Oct. 21st, 1885.

That there is due from the defendant, Mills H. Beardsley, to the plaintiff, after allowing said credit of $862.15, the sum of $8,506.40, of which $7,726.40 should bear interest from this date, to wit, June 19th, 1886, at the rate of one per cent. per month till paid, & $780.00 should bear interest from this date until paid at the rate of

ten per cent. per annum, the said $780.00 being for cost of collection provided for in said note and mortgage.

Conclusions of Law.

That plaintiff have judgment & decree against Mills H. Beardsley for $8,506.40, of which $7,726.00 is to bear interest at the rate of one per cent. per month until paid & $780.00 of which is to bear interest at the rate of ten per cent. per annum until paid, & also for costs of this action, and that plaintiff have decree to the effect that John G. Tyler, the receiver heretofore appointed herein, continue to hold & control the property described — Schedule "A" of the stipulation filed herein until the same shall be sold as hereinafter provided, the same
82 being chattel property included in said mortgage, & that said receiver continue to hold and control the other property described in said chattel mortgage & now in his possession, except that described in Schedule "B" of said stipulation, in pursuance of the former order of this court & until the same shall be properly sold, and that the receiver bring suit or suits for the recovery of the property or its value, mentioned in Schedule Exhibit "E" of the 1st report of said receiver, and that he apply to this court from time to time for further order and instructions herein & in the premises; that the said sum of $8,506.40 is a valid lien upon the said personal property now under the control of said receiver and is secured by the said chattel mortgage; that the conditions of said mortgage have been broken by said Beardsley, & that the plaintiff is entitled to have said mortgage foreclosed & the personal property now under the control of said receiver and that included in said mortgage, which may be brought under his control, sold in the manner prescribed by law for the sale of personal property, and to have the proceeds arising from such sale applied to the payment of said sum so found due, and to have the money now in the hands of said receiver, to wit, $—, paid to him on his said claim so found due; that the said plaintiff is entitled to his said claim so found due, to be paid in United States gold coin.

ORLANDO W. POWERS, *Judge.*

83 (Endorsed:) No. 697. First dist. court, Utah Territory. James C. Armstrong *vs.* M. H. Beardsley *et al.* Findings & decision. Filed June 24th, 1886. T. A. Perkins, clerk.

In the District Court of the First Judicial District of Utah Territory, Weber County.

JAMES C. ARMSTRONG, Plaintiff,
vs.
MILLS H. BEARDSLEY, JOHN BROOM, and E. A. WHITAKER, Defendants. } Decree.

This cause came regularly on to be heard in open court, Ransford Smith & J. R. McBride appearing as counsel for plaintiff and Kimball

& Heywood & Marshall & Royle appearing as counsel for defendants, John Broom & E. A. Whitaker, and P. H. Emerson appearing as counsel for defendant, Mills H. Beardsley, the said Beardsley being in default for answer and his default being duly entered, the court having heard the evidence and proof produced herein and the arguments of counsel and having this day filed its decision and findings herein and coming now to render its decree herein,

84 it is adjudged, decreed, and considered by the court that the receiver heretofore appointed, to wit, said John G. Tyler, continue to hold and control the property described in Schedule "A" of the stipulation filed herein until the same shall be sold as hereinafter provided, and that he continue to hold and control the other property described in said chattel mortgage and now in his possession, except that described in Schedule "B" of said stipulation, in pursuance of the former order of this court and until the same shall be sold as hereinafter provided, and that he bring suit or suits for the recovery of the property or its value mentioned in Schedule Exhibit "E" of the report of said receiver filed herein February 8th, 1886, and that he may apply to this court from time to time for further order and instructions herein and in the premises, and the court having found and finding that there is now due and owing to plaintiff, James C. Armstrong, from defendant, Mills H. Beardsley, upon the promissory note and chattel mortgage set forth and described in plaintiff's amended and supplemental complaint the sum of eight thousand five hundred and six dollars and forty cents, and that the defendant, Mills H. Beardsley, is personally liable for the whole amount thereof, and that $7,726.40 thereof should bear interest from this 24th day of June, 1886, until paid, at the rate of one per cent. per month, and $780.00 thereof should

85 bear interest from said 24th day of June, 1886, at the rate of 10 per cent. per annum until paid; that the said $8,506.40 is a valid lien upon the personal property described in plaintiff's amended and supplemental complaint, and hereinafter set forth and described, and is secured by the mortgage mentioned in said amended & supplemental complaint and as therein mentioned and set forth; that each and all of the terms and conditions of said mortgage have been broken by the said defendant, Mills H. Beardsley, and that plaintiff is entitled to have said mortgage enforced and foreclosed and the personal property hereinafter set forth and described sold in the manner prescribed by law, and the proceeds arising from such sale applied to and upon the payment of said sum of money so due as aforesaid, and that the plaintiff is entitled to the other relief herein granted.

It is further adjudged, decreed, and considered by the court that all the mortgaged property hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff aforesaid, be sold at public auction by the U. S. marshal of the Territory of Utah or the sheriff of the county of Weber, in said Territory, or other proper officer, in the manner prescribed by law for the sale of personal property seized on execution, and that for that purpose said receiver produce said property at the sale and as it — sold

deliver the same — purchaser or purchasers on the payment
86 to the officer selling of the purchase price thereof; that the said officer, out of the proceeds of said sale, retain his fees, disbursements, and commission on said sale and pay to the plaintiff out of said proceeds the amount so found due as aforesaid, to wit, $8,506.40, with interest thereon, to be computed from this 24th day of June, 1886, as follows: On $7,726.40, at the rate of one per cent. per month, and on $780.00, at the rate of 10 per cent. per annum, or so much thereof as the said proceeds of sale will pay of the same; all to be paid in United States gold coin.

The personal property to be sold under this decree consists of the property described in said Schedule "A" and of the ice in the ice-house on Wall street, in Ogden, Weber county, Utah, and the ice-house behind the Broom Hotel, in said city; *side* ice-house is to be sold to be removed; and it is further ordered, adjudged, decreed, and considered that the defendants, John Broom and E. A. Whitaker, pay the costs of this suit, except the sum of $50.00, which it is ordered to be paid out of the proceeds of said sale, and that for said costs, to be taxed, execution is awarded and may issue against said John Broom and E. A. Whittaker.

Entered June 24th, A. D. 1886.

ORLANDO W. POWERS, *Judge.*

87 Endorsed: No. 697. James C. Armstrong *vs.* Mills H. Beardsley *et al.* Decree. Filed June 24th, 1886. T. A. Perkins, clerk.

In the District Court for the First Judicial District of the Territory of Utah, Weber County.

JAMES C. ARMSTRONG, Pl'ff,
vs.
M. H. BEARDSLEY, JOHN BROOM, and E. A. WHITAKER, Def'ts.

TERRITORY OF UTAH,
County of Weber, } *ss:*

I hereby certify that the foregoing is a true copy of the judgment and decree entered in the above-entitled action and recorded in Judgment Book "A" of the above-named court, at pages 242 & 243; and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of said court, hereto set on this 24th day of June, A. D. 1886.

T. A. PERKINS,
[SEAL.] *Clerk 1st District Court, Utah Territory.*

88 (Endorsed:) No. 697. In 1st district court, Utah Territory. J. C. Armstrong *vs.* M. H. Beardsley *et al.* Judgment-roll. Filed June 24th, 1886. T. A. Perkins, clerk.

In the District Court of the First Judicial District, Territory of Utah.

JAMES C. ARMSTRONG, Plaintiff,
vs.
M. H. BEARDSLEY *et al.*, Defendants. } Order Denying Motion for a New Trial.

This cause having been heretofore submitted to the court on the motion of the defendants, John Broom & E. A. Whittaker, for a new trial and by the court taken under advisement, and the parties being present by their attorneys, viz., the plaintiff by Ransford Smith, his attorney, and the defendants, John Broom & E. A. Whitaker, by James N. Kimball, their attorney, and Mills H. Beardsley by P. H. Emerson, his attorney; and the court, now being fully advised in the premises, does consider that said motion ought to be denied and does deny the same; to which denial of said motion the defendants, John Broom and E. A. Whittaker, except.

In open court, November 15th, 1886.

(Signed) H. P. HENDERSON, *Judge.*

89 In the District Court of the First Judicial District of the Territory of Utah, County of Weber.

JAMES C. ARMSTRONG, Plaintiff,
vs
M. H. BEARDSLEY, JOHN BROOM, and E. A. WHITAKER, Defendants.

Statement of the case to be used on motion for a new trial by the defendants, John Broom & E. A. Whittaker, and, in the event of an appeal by them, on such appeal.

The above-entitled action was tried by the court without a jury on the tenth and eleventh days of February, A. D. 1886. Messrs Ransford Smith and John R. McBride appeared as counsel for plaintiff and Messrs. Kimball & Heywood and Marshall & Royle as counsel for defendants, John Broom & E. A. Whitaker.

SMITH: Your honor, we will introduce the note of M. H. Beardsley to James C. Armstrong, the plaintiff, with the endorsements thereon.

KIMBALL: We make no objection because its execution and delivery is admitted by the pleadings. Note marked Exhibit No. "1," a copy of which is hereto attached and made a part hereof, marked Exhibit No. 1, A. H. W.

SMITH: I now introduce the chattel mortgage, with the endorsements thereon, being the chattel mortgage under which this suit is brought.

KIMBALL: I object to it on the grounds that it is immaterial as to the defendants represented by myself and Mr. Heywood—Mr. Broom & Mr. Whittaker.

SMITH: We think is is material because there is a denial
90 of the ownership that the plaintiff is the owner and holder of this chattel mortgage, and we desire to introduce the chat-

tel mortgage and its endorsement as coming from the possession of the plaintiff, just as we did the promissory note. If there is any objection to its execution we are ready to p-ove its execution.

KIMBALL: We make no objection as to the execution of the mortgage. The objection we make is that it is immaterial, so far as the defendants represented by us are concerned, for the reason that it appears from the complaint in this action that our interests, if any we have in this property, accrued subsequent to the expiration of that instrument as a mortgage against the other parties than the maker.

COURT: I think I will admit it *pro forma.*

A copy of which mortgage is attached to the amended and supplemental complaint *as* is hereby referred to as a part hereof.

Exception by defendants.

SMITH: I ask to take a *pro forma* default against the defendant Beardsley now, your honor.

No objection.

COURT: The default may be entered.

SMITH: We introduce this against M. H. Beardsley and also as against the other defendants, so far as it may be applicable.

91 KIMBALL: Our objection is restricted to the other defendants, but I think now it is immaterial as to Mr. Beardsley also, because the default admits all the allegations of the complaint.

KIMBALL: One thing I omitted. Messrs. Marshall & Royle I desire to have entered of record as attorneys with Kimball & Heywood in this action as appearing for the defendants Broom & Whitaker.

SMITH: I desire also that Judge McBride's appearance should be entered as associate counsel for plaintiff.

JAMES C. ARMSTRONG sworn for plaintiff.

Examined by Captain SMITH:

Q. I want to put in your hands this note and mortgage, being the note and mortgage sued on in this case. (Hands witness papers.)

Q. Who is the owner and holder thereof of the note and mortgage I put in your hands, being the note and mortgage sued — in this case?

KIMBALL: I object to it as a leading question.

MARSHALL: And also that it — a conclusion of law; it is a conclusion of law instead of fact.

COURT: I think the second objection should be sustained.

Exception by plaintiff.

Q. Have you been in the possession of that note and mortgage by yourself or your agent or attorney; and, if so, for how long?

92 Objected to on the grounds that the question is leading objection overruled; exception by defendants.

Q. Have you been in possession of that note and mortgage; and, if so, for how long, by yourself or your agents or attorneys?

A. Since about the middle of last January—January a year ago.

Q. You have been in possession of it?

A. Yes, sir.

Q. Do you know who is the owner of that note and mortgage is at this time?

A. I am.

Q. Do you know? Say yes or no.

A. Yes.

Q. Who is the owner of that note and mortgage?

A. I am.

Q. Who has been the owner of that note and mortgage from a day prior to the beginning of this suit to the present time?

A. I have. Since the 14th of last January a year ago I have been the owner. I believe that is about the date of it.

Cross-examined by JAMES N. KIMBALL, Esq.:

Q. For what consideration was this note given to you?

SMITH: I make a formal objection to that; it is not cross-examination.

Objection overruled; exception by plaintiff.

93 WIT.: For the consideration of eight thousand dollars.

Q. To whom was the eight thousand dollars owing at the time this note was given, Mr. Armstrong, and how did the indebtedness arise?

Q. There was a note I held against Mr. Beardsley of $2,501, and the balance of the eight thousand dollars was due to the bank.

A. The Commercial National Bank.

Q. The Commercial National Bank?

A. The Commercial National Bank of Ogden.

Q. So, then, the consideration of this note for eight thousand dollars was an antecedent note you held against Mr. Beardsley yourself for $2,501?

A. $2,501 for a note from Mr. Beardsley to me individually.

Q. And the balance was a debt due the Commercial National Bank of Ogden?

A. Yes, sir.

Q. How did the $2,500 debt originate?

A. At the time Mr. Beardsley bought the Broom Hotel of Mr. Shakespeare a large portion of that money came to me; there was a balance of $2,501 due me on our final settlement, and Mr. Beardsley asked time on that amount of money, which I gave him and took his note for it.

Q. How did this balance of eight thousand dollars occur as a debt against Mr. Beardsley, do you know?

94 A. The balance of the eight thousand dollars was an obligation due to Harkness & Co. from Mr. Beardsley, and came down to the Commercial National Bank.

Q. Do you know, Mr. Armstrong, whether or not the indebtedness to the Commercial Bank, of which you have spoken, was evidenced by note—I mean that part of this eight thousand dollars which you say was a debt owing to the Commercial National Bank—was that evidenced by notes to the bank of Mr. Beardsley's?

WIT.: To Harkness & Co.?

Q. Yes; to Harkness & Co.

A. I believe so.

Q. Then it became an indebtedness due the Commercial National Bank. Was it evidenced by notes?

A. The same papers—I suppose the same notes—held by Harkness & Co. were turned over to the Commercial National Bank.

Q. Now, at the time of the execution of the note, was the note which you held and the notes that the Commercial National Bank held surrendered to Mr. Beardsley?

WIT.: The note that I held?

Q. Yes; and the other notes held by the bank.

A. The note that I held was endorsed by me to the bank; in regard to the other I am not able to say.

Q. You say the note you held was endorsed to the Commercial National Bank?

A. Yes.

95 Q. Was it delivered by you to the Commercial National Bank when you endorsed it?

A. Yes, sir.

Q. You say you endorsed the $2,500 note to the Commercial National Bank?

A. Yes, sir.

Q. Did you deliver it to the bank at the time of that endorsement?

A. Yes, sir.

Q. You say you don't know whether the notes held by the bank against Mr. Beardsley and your own note were surrendered to Mr. Beardsley at the time of the execution of this note?

A. No, sir; I could not say to that.

Q. For all you know, the bank still holds those original notes given by Mr. Beardsley?

WIT.: You speak in regards to the note due Harkness & Co.?

Q. Yes; the note due to Harkness & Co. and assigned by Harkness & Co. to the Commercial National Bank?

A. What became of those notes when I took the new ones I am not able to say.

Q. What became of the twenty-five-hundred-dollar note that Beardsley gave you and you assigned to the Commercial National Bank—when this note was taken?

A. I suppose Mr. Beardsley has it. I suppose it was turned over to Mr. Beardsley.

96 Q. The note was still then in the hands of the Commercial National Bank at the time of the execution of this note?

A. I could not say. I turned it over to the Commercial National Bank.

Q. And you don't know whether any of these notes were surrendered or canceled at the time this note was given?

A. I could not say positively; the supposition is that they were surrendered. I never saw them surrendered, but I suppose they were surrendered to Mr. Beardsley.

Q. Those notes that the Commercial National Bank took from Harkness & Co. were endorsed by Harkness & Co., were not they?

A. I don't know about that.

Q. How did you come to endorse and deliver your twenty-five-hundred-dollar note to the Commercial National Bank?

A. For the very reason I was a stockholder in the bank, and in arranging our business with Beardsley I did — wish to make my individual interest conflict with the interest of the bank, and so I endorsed my note to the bank so it would be a company transaction.

Q. For a consideration—the endorsement to the bank and delivery to the bank was for a consideration from the bank?

97 A. Yes, sir.

Q. Then at the time of the execution of this note the whole indebtedness of Beardsley for which this note was given was owned by the bank, was it?

A. Endorsed by me.

Q. Was owned by the bank?

A. Endorsed by me.

Q. And the others endorsed by Harkness & Co.?

A. I don't know anything about Harkness & Co. paper at all.

Q. When you took this note what did you do with it?

WIT.: This eight-thousand-dollar note?

Q. You say this note was given to you—it appears on its face to have been given to you—what did you do with it when it was delivered to you?

A. I gave my own individual note instead of it.

Q. To whom did you give your own individual note?

A. To the bank.

Q. This note appears to have your endorsement on it. When was that endorsement made?

A. I cannot say when it was made. There is no statement on the note and I do not remember when it was made.

Q. Didn't you, at the time you took this note, endorse it in blank with your name, J. C. Armstrong, and deliver it to the Commercial National Bank?

WIT.: At the time I took that one?

Q. Yes.

98 WIT.: I don't know that I understand your question.

Q. When you took this note didn't you endorse it and deliver it to the Commercial National Bank?

A. I did.

Q. In taking this note, were you present at the time Mr. Beardsley executed this note?

A. I believe I was.

Q. When it was executed what was done with it by you or Mr. Beardsley?

A. It was held by the bank.

Q. You endorsed it and it was held by the bank?

—. —.

Q. Is it not a fact in taking this note and making this transaction with Mr. Beardsley you were acting as the agent of and for the bank?

A. I was in a measure acting as a trustee, you understand. I endorsed $2,500 of that amount of money that was due to me to the bank.

Q. The bank paid you the money?

A. The bank paid me the money upon the note.

Q. So it came the owner of that note from Beardsley to you and then it also held other notes of Beardsley's or other indebtedness?

A. Yes.

Q. All together amounting to the sum of eight thousand dollars; so that the whole consideration for this note was moving from the Commercial National Bank to Mr. Beardsley, was it not; this note was given for a debt due the Commercial Bank?

A. For a certain sum of money.

99 Q. Although it was made in your name you was simply acting for the bank, and immediately upon it being given you endorsed it and delivered it to the Commercial National Bank. Now, it remained all the time the property of the Commercial National Bank from that time on, did it not?

A. Yes.

Q. And it has ever since been the property of the Commercial National Bank, has it not—this note, and it was the property of the Commercial National Bank at the time of the commencement of this suit, was it not—this note, Exhibit No. 1?

A. I do not know that I understand you. I stated to you awhile ago the situation. At the beginning of this transaction a certain amount of that money was due to me individually and I turned it over to the bank—endorsed it to the bank.

Mortgage, with the endorsements thereon, heretofore offered in evidence by plaintiff's counsel, marked Exhibit No. 2, a copy of which is attached to the amended and supplemental complaint herein, and is hereby referred to and made a part hereof.

Recess until 2 o'clock p. m.

TWO O'CLOCK P. M.

Examination of J. C. ARMSTRONG resumed.

Redirect examination by Captain SMITH:

100 Q. When you took this note and mortgage how much was M. H. Beardsley, the defendant, indebted to you?

WIT.: Individually?

Q. Yes.

A. $2,501.00.

Q. In regard to the rest of the note, over and above the $2,501.00, making up the eight thousand dollars, to whom was he indebted?
A. To the Commercial National Bank of Ogden.
Q. When you took the note for eight thousand dollars, what did you — with it?
A. I endorsed the note to the bank.
Q. To the Commercial National Bank?
A. To the Commercial National Bank.
Q. When did you take that note up?
A. I took that note up about the middle of July.
Q. How did you take it up?
A. By giving my individual note.
Q. What year did you take it up?
A. 1885.
Q. By giving your individual note?
A. Yes, sir.
Q. To whom was the note handed? When you gave your individual note to whom was the eight-thousand-dollar note handed?
A. To Mr. Hill, the cashier of the bank.
Q. Was it afterwards handed to you?
A. No, sir.
Q. When did you become the possessor of the eight-thousand-dollar note in suit?
101 A. About the middle of July.
Q. When you gave your note for it?
A. When I gave my note for the eight thousand dollars I became the possessor then of the old note.
Q. Of the note that is sued on you became the possessor then?
A. Yes, sir.
Q. That was before the suit was brought?
A. Yes, sir.
Q. You had that note when this suit was brought?
A. Yes, sir.
Q. As to 2,501 dollars of that note the consideration was due to you?
A. Yes, sir.
Q. As to the rest, it was due to the bank?
A. Yes, sir.
Q. I understood you to say you were trustee for the bank as to the rest?
A. Yes, sir.
Q. And you gave your own obligation for it?
A. Yes, sir.
Q. From the time you gave your own obligation for it—your own note—the amount became yours and in your possession?
A. Yes, sir.

Recross-examination by Mr. KIMBALL:

Q. You say some time in July of last year you gave your individual note to the bank for eight thousand dollars?

102 A. Yes, sir.

Q. What consideration did they give you for that note?

A. I had endorsed the note—when I took the mortgage I endorsed the note to the bank, and when I thought it was advisable to proceed to collect I thought it better, inasmuch as the bank held me responsible, that I give my individual note for the amount.

Q. What was done with this note in suit at that time?

WIT.: What note have — reference to?

A. To the note this suit is on—the eight-thousand-dollar note now in suit.

WIT.: What became of that note?

Q. Yes, at the time you gave your note for eight thousand dollars.

A. I took up the old note. That note was in court here this morning.

Q. Was it then and there delivered to you?

A. Yes, sir.

Q. What understanding or agreement did you have with the bank when you made this transaction with Mr. Beardsley, as to the relation you were to sustain to the bank by reason of taking this eight-thousand dollar note and mortgage? What agreement did you have with the bank as to what your status was to be in this transaction?

A. In the first place, there was 2,500 dollars of this money
103 that was due to me, and in order that my claim would not conflict with the claim of the bank I endorsed that 2,500-dollar note to the bank and acted as trustee for the bank in the collection of the whole amount of the eight thousand dollars.

Q. Then when you took the eight-thousand-dollar note you were not individually responsible to that bank for a greater sum than 2,500 dollars at that time?

A. I am responsible to the bank for eight thousand dollars, and was at the time I made that transaction responsible to the bank for the whole amount of the eight thousand dollars.

Q. At what time did you make the transfer of the 2,500-dollars-note to the bank?

A. I think about the middle of last January a year ago. I don't remember the exact date, but I think it was about the middle of January.

Q. Before or after the making of this eight-thousand-dollar note?

A. Before.

Q. At that time and up to the time you took this eight-thousand-dollar note you were not responsible to the bank for any of this indebtedness, were you?

WIT.: Please state your question again.

Q. At the time of the endorsement of the 2,500-dollar note to the bank you were not individually responsible to it for any of Mr. Beardsley's indebtedness, were you?

104 A. No, sir.

Q. Then the only way you became responsible is by assuming to take this note and mortgage from Mr. Beardsley, is it not?

A. I took it to secure myself in part and the bank for a certain amount, making the balance of the eight thousand dollars.

Q. Is it not a fact that the bank did not and don't look to you for the payment of any of this money over and above the twenty-five-hundred-dollar note you endorsed?

A. The bank looks to me for the payment of the full amount of my note, which is eight thousand dollars, which the bank holds against me to-day.

Q. You took up the eight-thousand-dollar note by giving your own eight-thousand-dollar note?

A. Yes, sir.

Q. Was not that done simply that the bank might have something to represent this indebtedness, and was it not understood at the time you assumed no responsibility by giving that note?

A. No, sir; I think not.

Q. What was said and done with reference to that between you and the bank?

A. I don't remember just what may have been said at that time, but we do not in the bank there propose to take chattel or real mortgages, and it was considered advisable, if there was any-
105 thing of this kind done, that individual members of the bank or stockholders would stand in as trustees of the bank.

Q. Now, as I understand you, it is the custom of that bank—perhaps the custom of others, but at any rate it is the custom of that bank, is it not—that when you take mortgages, either chattel or real, that they are taken in the name of one of the directors of the bank for the bank itself?

A. I cannot say it is the regular custom, but we have done it.

Q. But you did in this instance?

A. Yes, sir.

Q. After you completed the transaction with Beardsley you endorsed the eight-thousand-dollar note to the bank?

A. Yes, sir.

Q. Delivered it to the bank?

A. Yes, sir.

Q. And it was kept in the bank up to the time or held by the bank up to the time you gave your individual note for eight thousand dollars?

A. Yes, sir.

Q. Was it the agreement—what was the agreement at that time with reference to the liability assumed by you by reason of you giving the eight-thousand-dollar note?

106 A. As I stated before, I do not know that there was any agreement made. I do not think there was; but there may be; there was an understanding that in the event of any losses through Mr. Beardsley that I stood in *pro rata* with the bank in proportion to the amount of money that was due me individually.

Q. Then your liability to the bank was coextensive with and no greater than the amount represented by that twenty-five hundred dollars?

A. No, sir; my liability to the bank is the full amount of that note of the eight thousand dollars.

Q. How did that liability arise?

A. It simply arose because I have given my note for that amount of money and the bank holds it.

Mr. MARSHALL:

Q. Your original liability to the bank was only 2,500 dollars that you assigned to the bank and as endorser became liable to the bank for, was it not?

WIT.: How is that?

Q. Your original liability to the bank was 2,500 dollars—the note of Mr. Beardsley that was payable to your order and assigned by you to the bank for value and you are the endorser on it—2,501 dollars?

A. Yes, sir.

Q. That was your liability, then?

A. Yes, sir.

107 Q. Were you liable at all to that bank for 5,500 dollars?

A. I was when I endorsed.

SMITH: I object to his being interrupted before he his completed his answer.

Q. Were you liable at the time you gave the 2,500-dollar note—assigned that to the bank? Were you then liable for the 5,500 dollars that Beardsley was indebted to the bank?

A. Not until after I took the chattel mortgage from Mr. Beardsley and endorsed the note that Mr. Beardsley gave me ever to the bank; then I was liable for the whole amount.

Q. You were at that time a director of that bank?

A. Yes, sir.

Q. And vice-president of the bank, were not you?

A. No, sir.

Q. But you were an officer of the bank?

A. I was a director of the bank at that time.

Q. Was there any pecuniary consideration in money moving to you, other than this twenty-five hundred dollars, for becoming liable for 5,500 dollars more—did you receive any value for that liability?

A. Not other than being a stockholder in the bank. I received nothing. As I stated a good while ago, I was acting as trustee for the bank.

108 Q. Was not your object to secure the bank debt of 5,500 dollars? Was not your object to secure that bank debt of 5,500 dollars, as you could as — officer of the bank?

A. Yes, sir.

Q. And as a stockholder in the bank?

A. Yes, sir.

Q. You had no personal pecuniary interest in that 5,500 dollars other than as a stockholder and director of the bank?

A. No, sir.

Q. Have you received any other interest in the evidence of that

debt that has been transferred to the bank since—any other pecuniary interest other than as I have already stated as a director and stockholder in that bank?

A. I have not.

Q. The debt, then, in equity and in good faith, is still the bank debt to the amount of fifty-five hundred dollars, is it not?

A. Inasmuch as I had endorsed that obligation to the bank in the first place the bank holds me responsible, and before I commenced this action I thought best to give my individual note to the bank, and inasmuch as they hold me responsible I thought I could proceed to collect better than the bank could.

Q. Was not the note you gave the bank overdue at that
109 time—at the time you took it up for the purpose of suit—took up the eight-thousand-dollar note?

A. I think not.

Q. Was it not overdue when this suit was brought?

A. I could not state exactly as to the dates.

Q. Was not that eight-thousand-dollar note due in May?

A. I think not.

(Hands witness note.)

WIT.: It seems it was due in May.

Q. The note, then, was due in May. I understood you a few minutes ago to say you took that note up because you were liable on it, and gave your individual note in July, at the time you brought this suit.

A. Yes, sir; just before I brought suit.

Q. It was in July you gave your note for it?

A. Some time in July; I do not remember the exact date; about two months after the maturity of this note.

Q. Was that note the original note of eight thousand dollars which you had endorsed and delivered to the Commercial National Bank of Mr. Beardsley's—had that been protested?

A. I do not know whether it was or not.

Q. Was there any waiver or protest on the back of it?

A. As soon as Mr. Beardsley failed——

110 Q. Was that note protested or protest waived on the back of it by endorsement or any written article?

A. No, sir; I think not.

Q. Had any demand of payment been made for the payment of that whole amount of eight thousand dollars by the bank or any of its officials to settle that debt?

A. Yes, sir.

Q. They had demanded of you to pay the whole eight thousand dollars—the bank had?

A. I do not remember that the whole amount was demanded of me before this note was taken up.

Q. I want to ask you honestly and fairly, Mr. Armstrong, whether you were not and didn't consider yourself as acting as agent or trustee, as you may call it, to secure and collect that money for the bank, outside of any personal liability of yours?

A. No, sir; if I hadn't to pay the twenty-five hundred dollars in the first place in there I should not have done it.

Q. Then, I understand you, as a business man, for the purpose of securing twenty-five hundred dollars and securing yourself as endorser of that twenty-five-hundred-dollar note to the bank you became also endorser for fifty-five hundred dollars more?

A. Yes, sir.

111 Q. Please state to the court your object, as a business man, in so doing to secure your twenty-five hundred dollars that you became liable for fifty-five hundred in addition, outside of your relation as trustee or agent for the bank.

A. My reason was because I was a large stockholder in the bank.

Q. Then it was as a stockholder in the bank that you aimed to secure that fifty-five hundred dollars, was it?

A. Yes, sir.

Q. It was not, then, exclusively or at all, to secure the twenty-five hundred dollars?

A. Of course, if I should try to save the twenty-five hundred dollars I should try to save the balance, because a large portion of it was mine.

Q. Your object in doing that was because you were a stockholder and interested in it to that extent as a stockholder?

A. Of course, it is pretty hard matter to state just how I felt about it at that time, but inasmuch as there was a certain amount of that money belonging to me individually, and that I was one of the principal stockholders in the bank, I presume that was the reason I endorsed—became responsible for the whole amount.

Q. What has become of that note you gave the bank when you took up this other note—eight-thousand-dollar note?

112 A. The bank holds it, sir.

Q. Have you paid that note?

A. No, sir.

Q. Or any portion of it, sir?

A. No, sir. They want me to, but I have not been able to do it.

Q. That is your individual note?

A. Yes, sir.

Q. Did the bank hold any other securities for this fifty-five hundred dollars?

A. I think not.

Q. None whatever?

A. None what I know of. I think I can say safely none other.

Q. Then you voluntarily—being a stockholder, you voluntarily became liable and guaranteed that bank fifty-five hundred dollars more than you were already liable for, because you were a stockholder?

A. Yes, sir.

Q. *That* was the total indebtedness of Mr. Beardsley to the Commercial National Bank at the time this note was given?

Objected to as immaterial in this case; objection overruled; exception by plaintiff.

113 A. I believe about twenty-one thousand dollars. I could not state exactly, but I think twenty-one thousand dollars.

Q. As a stockholder in that bank, did you endorse the balance of that indebtedness because liable for it?

A. No, sir.

Q. Why not—because you thought you were carrying him enough?

A. I didn't think it advisable to shoulder it all.

Q. But you were kind enough to endorse for fifty-five hundred dollars more than you were liable——

A. I stated the reason I did that because——

Q. Mr. Armstrong, what security did the bank have for the entire twenty-one thousand dollars?

Objected to as immaterial; objection overruled; exception by plaintiff.

A. The bank holds—not the bank—but the bank was secured by certain parcels of real property in Ogden, a certain piece of land in the State of Michigan, and also a piece of land in the State of Ohio.

Q. How was it secured, by absolute conveyance or by specific mortgages or deeds of trust?

114 Objected to by counsel for plaintiff on the same ground—it is immaterial, irrelevant, and incompetent. Objection overruled; exception by plaintiff.

WIT.: It was secured by mortgages.

Q. Were those mortgages taken direct to the bank or officers of the bank to secure the general indebtedness of Mr. Beardsley?

Objected to by counsel for plaintiff; whatever they were may be shown by record evidence. Objection overruled; exception by plaintiff.

WIT.: They were taken by officers of the bank.

Q. Were not those deeds absolute deeds on their face and bonds for return deeds delivered by the grantees to Mr. Beardsley?

WIT.: Please state that question again.

Q. Were not those deeds absolute on their face, absolute conveyances on their face, and bonds back from the grantees to Mr. Beardsley to recovery on the payment of certain sums of money?

A. I really am unable to answer that; I rather think they were bonds.

Q. I think three of them were due to yourself, were not they?

A. I think so; this Ogden property was to me.

Q. An absolute deed to you?

A. I think not.

Q. Didn't you give a bond back to Beardsley?

A. I did; yes, sir.

115 Q. And afterwards the whole transaction was cancelled by surrender of the bonds, was it not?

A. Yes, sir.

Q. And the deeds were left in your hands, the absolute title left

in you? Now, after refreshing your memory, you think those deeds were absolute on their face, do you?

A. No; I could not say that I do, because Mr. Beardsley had a certain length of time to redeem; I forget just the time that those obligations matured; any time up to maturity he had a right to pay the amount of money that was held against the property or that the property was held for and become the possessor of the property.

Q. I would ask you, is that specified in the deed to you?

Objected to by plaintiff's counsel on the ground that the deed should be produced.

Question withdrawn.

Q. Have you that deed in your possession?

A. I have not.

Q. Have those bonds been surrendered by Mr. Beardsley to those trustees or to the bank for those various pieces of property—real estate? Have they been cancelled or delivered back by Mr. Beardsley for those different pieces of property?

A. I believe they have.

Q. The bank (trustees) have taken them back and the bonds have been surrendered to them, and they now hold the property?

116 A. Yes, sir.

Q. I would ask you, then, whether this eight-thousand-dollar transaction between yourself and the bank—the note for eight thousand dollars which you delivered to the bank when you received the Beardsley eight-thousand-dollar note—whether that was not done for the purpose of bringing this suit, because it was thought better it should be brought in your name—whether that was not the consideration that moved you?

A. I think the cashier required—preferred to have it done.

Q. They thought it better to bring it in your own name?

A. Either to pay it up or give my individual note for it.

Q. And that you should bring it in your name; was not that it? Was it not discussed among the officers of the bank, with the cashier of the bank, that the suit better be brought in your name than the name of the bank?

A. Really I am not able to say. I thought in regard to bringing the suit—inasmuch as Mr. Hill, the cashier, wanted the thing settled up, I considered on my own account that it was advisable to give my individual note and take the whole matter into my hands.

Redirect examination:

Q. Before you brought this suit you gave your own note to the bank, I understood you say, for this note and took it up yourself?

117 A. Yes, sir.

Q. Then you brought this suit here?

A. Yes, sir.

OSCAR E. HILL sworn for plaintiff.

Q. Are you the cashier of the Commercial National Bank?
A. I am.
Q. Were you such cashier on the 13th and 14th of January, 1885?
A. Yes, sir.
Q. And have been since that date?
A. Yes, sir.
Q. Were you present at the time Mr. Armstrong took from Mr. Beardsley, the defendant, the chattel mortgage and note in this suit?
A. Yes, sir; I was there.
Q. What was done with that note when Mr. Armstrong had taken it?
WIT.: The note that is in suit?
Q. Yes.
A. We bought the note of Mr. Armstrong.
Q. The bank bought the note of Mr. Armstrong?
A. Yes, sir.
Q. Look at the note. (Hands witness note in suit.) Q. How long did your bank hold it?
A. Held it until some time in July of last year.
Q. What did you do with it then?
118 A. We turned it over to Mr. Armstrong and told him that we wanted the matter fixed up some other way; that the note was past due and we didn't want to carry it any longer.
Q. What did he do?
A. He gave his own note for the amount due, the balance due, on that note to the bank and he delivered the note to me.
Q. Was that prior to the suit brought in this case?
A. Yes, sir; it was about the 14th of July, if I remember rightly.

Cross-examined by JAMES N. KIMBALL, Esq.:

Q. You say that when this note and mortgage in suit was taken by Mr. Armstrong of Mr. Beardsley you were present?
A. Yes, sir.
Q. You were present at the time?
A. Yes, sir.
Q. What was the consideration for this note and mortgage passing from Mr. Armstrong to Mr Beardsley?
A. Mr. Armstrong got the proceeds of it.
Q. I didn't ask that. What was the consideration moving from Mr. Armstrong to Mr. Beardsley—what did Mr. Armstrong give Mr. Beardsley for this note and mortgage?
A. Mr. Beardsley was owing us part of the debt—a sum of money—and he was owing Armstrong a sum and we put them in together and Mr. Armstrong took the debt.
119 Q. How much of the eight thousand dollars was owing to the bank and how much to Mr. Armstrong, at that time?

A. Mr. Beardsley was owing Mr. Armstrong a note of $2,501; the balance was owing to the bank.

Q. Who held and owned the 2,500-dollar note at the time of this transaction with Mr. Beardsley?

A. Mr. Armstrong, and the fifty-five hundred dollars was owing to the bank.

Q. How was that indebtedness evidenced—by note to the bank or otherwise?

A. Part by note and part by overdraft.

Q. Had not the bank owned this twenty-five-hundred-dollar note that you say was owing to Mr. Armstrong?

A. No, sir; it never did.

Q. Never had been endorsed to the bank?

A. No, sir.

Q. At the time of that transaction did the bank surrender to Beardsley the evidence of the indebtedness it held?

A. Yes, sir; it did; it surrendered the note, of course. He was credited on account of the overdraft.

Q. Who was the note surrendered to?

A. To him.

Q. To whom was the note surrendered? To whom was the note originally given?

A. To the Commercial National Bank, I believe; I don't remember distinctly, but I believe so.

120 Q. You say when Armstrong took the note and mortgage that the bank bought it of him?

A. Yes, sir.

Q. What consideration did the bank pay Armstrong for this note and mortgage?

A. He had credit for the amount and the understanding was we were to carry the note and that he was to be responsible for it—for the note.

Q. Then, after that time in July—you think it was in July—1885, he took up the note and gave a new one?

A. Yes, sir.

Q. You say he had credit on the books of the bank for this eight-thousand-dollar note of Beardsley?

A. Yes, sir; if I remember rightly, he had had credit for the 2,500-dollar note that belonged to him and our note account had credit for the balance that was due on the note of Beardsley.

Q. Armstrong got credit for 2,500 dollars?

A. Yes, sir.

Q. And the bank got credit for 5,500?

A. Yes, sir; whatever the balance was.

Q. At the time he endorsed the note?

A. Yes, sir.

Q. At the time he gave the eight-thousand-dollar note, in July, what consideration other than this eight-thousand-dollar note did the bank give Armstrong for his note?

121 A. Took his note to pay for this note—his note payable directly to the bank.

Q. Was not Mr. Armstrong acting for the bank in taking this note and mortgage, so far as 5,500 dollars of it was concerned?

A. No, sir.

Q. He was not acting for the bank?

A. No, sir.

Q. Still none of the indebtedness was his except 2,500 dollars of it?

A. Yes, sir.

Q. What consideration did Armstrong receive for that fifty-five hundred dollars when he gave his individual note in July?

A. Turned this note over to him to collect or do whatever he pleased with it.

Q. Is it a fact that Mr. Armstrong is not liable to the bank to pay it anything, in case it is not made out of this suit or out of this indebtedness against Beardsley, over and above the twenty-five hundred dollars that was originally owing to him?

A. The understanding is this, that we should put it together and those should be *pro rata*.

Q. That is, that if there was a loss he sustains a loss to the extent of the indebtedness represented by his twenty-five hundred dollars and the bank sustains a loss to the extent of its debt represented by the fifty-five hundred dollars.

122 A. Yes, sir.

Q. At the time Mr. Armstrong gave this eight-thousand-dollar note in July what became of the note and mortgage in suit?

A. I don't know; it was given to Mr. Armstrong.

Q. It was given to Mr. Armstrong?

A. Yes, sir.

Q. So, then, the bank is interested in this suit to the extent of fifty-five hundred dollars?

A. No, sir; I don't think we are; not as I know of.

Q. If there is a loss the bank sustains a loss, does it not?

A. I don't know that it does.

COURT: If Armstrong is only to sustain a loss to the extent of twenty-five hundred dollars, whatever that obligation amounted to, who is to sustain the loss of fifty-five hundred dollars?

A. I suppose the bank will have to sustain it.

Q. Then the bank is interested to that extent, is not it?

A. I suppose so.

Q. You are cashier of the bank and manager of its business, are you not?

A. Yes, sir; I am cashier and carry out the directions of the directors.

Q. Is it not frequently the case, Mr. Hill, that the bank takes security in the name of the officers?

A. No, sir; it is not often.

Q. Is this the only instance in which that has been done?

123 A. No, sir; there are other instances.

Q. In the other instances did the officers when they took

the security in their own names and endorsed them to the bank, as this was done, assume the liability for the indebtedness?

A. We have only one other instance; in that case they did.

Q. How much was Mr. Beardsley's indebtedness to the bank at the time of this transaction?

SMITH: We renew the objection we made before.

Objection overruled; exception by plaintiff.

WIT.: You mean inclusive of the note he gave Armstrong?

A. You stated he didn't owe that note to the bank. I mean to the bank.

A. About seventeen thousand dollars, if I remember rightly.

Q. That is exclusive of the twenty-five hundred dollars?

A. Yes, sir.

Q. Were any other securities taken from Mr. Beardsley at about the time of this transaction?

A. Yes, sir.

Q. To what amount?

WIT.: It was before this transaction.

COUNSEL: Not long before, was it?

A. About a week probably.

Q. To what amount were those securities?

124 A. I think $12,500.00.

Q. How where they taken?

A. By deeds of real estate.

Q. To the bank itself or to officers of the bank?

A. To officers of the bank.

Q. Mr. Armstrong is an officer of that bank, is he not?

A. He is a director.

Q. Any of those deeds taken to him?

A. Yes, sir.

Q. To what amount were those deeds given to him?

A. Six thousand dollars.

Q. Did he assume that indebtedness when he took that security?

A. No, sir; he did not.

Q. To what other officers of the bank were securities given at that time?

A. One was given to me and one to Mr. Langsdorf.

Q. What position, if any, did Mr. Langsdorf occupy in that bank at that time?

A. He was a director and vice-president.

Q. Did either you or Mr. Langsdorf assume the indebtedness for which these securities were taken?

A. Mr. Langsdorf didn't; I did for mine.

Q. What became of that property which you had security upon?

A. It belongs to the bank now.

Q. You mean by that it has been transferred from these various officers to the bank?

125 A. No, sir; still stands in the officers' names.

Q. But they hold it for the bank?

A. Yes, sir.

Q. How many deeds were given to Mr. Armstrong?
A. I have forgotten; I think one or two; I believe two.
Q. You say the amount was six thousand dollars?
A. Yes, sir.
Q. What was the amount of the debt given to you?
A. Five hundred dollars.
Q. What was the amount given to Langsdorf?
A. Six thousand dollars.
Q. Was not Mr. Langsdorf's deed to the amount of ten thousand dollars instead of six thousand dollars?
A. No, sir; it was not.
Q. And yours fifteen hundred dollars instead of five hundred?
A. No, sir; it was not.
Q. Have you in your possession those deeds?
A. Not in my personal possession. They are in the bank's possession.

MARSHALL: I will ask that they produce those deeds in court. We may want to offer them in evidence in this case.

Q. They were absolute on the face?
A. Yes, sir.
Q. Made direct to the parties?
A. Yes, sir.
126 Q. Bonds given back?
A. Yes, sir.
Q. And those bonds have since been surrendered and cancelled?
A. Yes, sir.

RANSFORD SMITH sworn for plaintiff.

Examined by Judge MCBRIDE:

Q. Do you know the defendants in this case?
A. Yes, sir.
Q. Did you ever give them any notice of the lien of the claim upon which this suit is brought?

Objected to by counsel for plaintiff.

Q. To be more specific, I will say of the note and mortgage upon which this suit is brought?

MARSHALL: We object to it as immaterial and irrelevant; that it cannot enlarge, extend, or give force to the statute in such case made and provided—any notice cannot.

Objection overruled; exception by defendants.

COURT: Whatever there is in the point may be considered on the argument.

WITNESS:

A. On the day of the levy, I think, the 13th of August, 1885, I gave to the marshal, immediately after he had taken possession of the property, full notice of the chattel mortgage, the note, and the

fact of the pendency of this suit; that was to Mr. T. A. Perkins, the deputy marshal, who made the levy upon the property. I gave this notice to him in the hotel. In reply he stated to me that he
127 had served the writs.

Objected to by defendants' counsel.

Q. Was there any other person present—either of the defendants?

A. Not on that day. On the day of the sale I announced publicly that the plaintiff, James C. Armstrong—made this announcement in the Broom Hotel just as the sale was called, before any bids were made—had the chattel mortgage sued on in this case, stating its substance; had the note, and the pendency of this suit. At that time Mr. Beardsley was present, when I began the announcement, but started upstairs. Mr. Broom was sitting by, within earshot, and Mr. Whittaker, to whom I had been introduced—I had been introduced to him just before—was sitting off on the other side. The announcement was made publicly and in a loud voice, so that every person in the room could hear it, and it was replied to by Mr. Heywood, counsel on the other side. The reply he made, I presume, I need not state.

Q. State what notice you gave there.

A. I stated that Mr. James C. Armstrong had a chattel mortgage on the property offered to be sold, for eight thousand dollars, which was of record; that he had a note to correspond with that mortgage; that a suit had been brought upon a certain day in July (naming the exact date, which I forget now), and that sum-
128 mons had been served upon Mr. Beardsley in that case, and that the suit was a pending suit, and that we claimed a lien upon all his property for the full amount of that note, and that no person would have any right to it until the marshal or some other person had paid the debt of Mr. Armstrong.

MARSHALL: We move to strike out all this testimony as immaterial and irrelevant.

KIMBALL: We claim it is immaterial and irrelevant in this action for this reason: Captain Smith testifies that he gave notice to the United States marshal on the day of the levy. Now, our rights to this—our rights to the property in this transaction—occurred when that levy was made, and notice given to the United States marshal was not notice to the plaintiff, and the notice given on the day of the sale and after the levy had been made was not notice that would affect a lien acquired by the levy and right acquired by the levy. When we purchased we took the right that was acquired by the levy, and notice to the marshal was not notice to the plaintiff.

COURT: The same course may be taken in regard to this motion as was taken in regard to the objection and considered at the conclusion of the case, and for that reason it may be overruled.

129 To which ruling defendants Broom and Whittaker excepted.

WITNESS: I wish to state that at the time I gave this notice I did

all this as attorney for Armstrong, the plaintiff in this case. I omitted to state it before.

MARSHALL: We object to all this for the reason that our rights accrued on the thirteenth day of August, when the levy was made, and any notice given after that time was of no effect.

Same ruling; exception by defendants.

OSCAR E. HILL recalled.

Examined by Captain SMITH:

Q. You were asked on cross-examination in regard to the amount of the debt which was secured to you by note and mortgage or by note and deed, and you stated it to be five hundred dollars, and you were asked whether it was not fifteen hundred dollars.

A. I was asked if the consideration in the deed was not fifteen hundred dollars.

Q. At whose request was that consideration put in the deed?

A. At Mr. Beardsley's. I stated that the consideration was five hundred dollars. I remember that the amount of the note and the amount in the deed were not alike.

Q. As to the consideration for the other real estate, do you remember whether there was a discrepancy between the note and the deed?

130 A. There was in the one to Langsdorf. The consideration in the deed was ten thousand dollars and the note was six thousand dollars.

Q. At whose request was that consideration put in the deed?

A. Mr. Beardsley's.

Q. The real amount of the debt was the amount you stated?

A. Yes, sir.

Cross-examination by JAMES N. KIMBALL:

Q. You testified a moment ago about Armstrong that the consideration was six thousand dollars. Were not there two deeds—one in which the consideration was six thousand dollars and the other twenty-five hundred dollars?

A. I don't remember that. He had two deeds, but what the consideration is in either one or both of them I don't know.

Plaintiff rests.

Mr. Kimball reads pleadings.

KIMBALL: I offer in evidence the complaint of the Utah National Bank against M. H. Beardsley, filed February 17th, 1885, in this court, being file No. 601 of the files of this court (a copy of which is hereto attached and made a part hereof, marked Exhibit "L").

SMITH: I object to it on a ground which will appear afterwards—that no judgment had been entered upon that complaint.

Objection overruled; exception by plaintiff.

131 KIMBALL: I now offer in evidence the summons in that case (file No. 601), and also the return endorsed upon the summons (a copy of which is hereto attached and made a part hereof, marked Exhibit "G").

COURT: It may be admitted.

Plaintiff's counsel excepts.

KIMBALL: I now offer in evidence memorandum of default of Mills H. Beardsley, made and filed by the clerk in that action (file No. 601), (a copy of which is hereto attached and made part hereof, marked Exhibit "H").

COURT: It may be admitted.

KIMBALL: I will now offer in evidence the judgment entered in that case, file No. 601, on the 18th of March, 1885, upon default (a copy of which is hereto attached and made a part hereof, marked Exhibit "I").

SMITH: I object to this, because there was no court at that time and the judgment was merely the act of a clerical officer.

COURT: I will overrule the objection, and whatever there is in the point of course I will consider at the conclusion of the case.

Plaintiff's counsel except to the ruling of the court.

KIMBALL: I now offer in evidence the execution issued in that action on the 12th day of August, 1885, with the return of the
132 United States marshal attached to it. I offer the return as well (a copy of which execution and return is hereto attached and made part hereof, marked Exhibit "J").

COURT: Have you any objection to the execution and return?

SMITH: None, excepting the objection which goes to the merits of the judgment.

MARSHALL: These papers may all be considered read, I suppose?

COURT: Certainly.

SMITH: We have no objection to all of them being considered read.

COURT: I will overrule the objection to the execution and return, and the point may be considered hereafter.

KIMBALL: The date of the judgment is Tuesday, August 4th, 1885.

KIMBALL: I want to offer in evidence the minutes of this court of the 4th day of August, 1885, for the purpose of showing that the court was in session after Mr. Beardsley was in default in the action now pending (a copy of which is hereto attached and made part hereof, marked Exhibit "K").

COURT: It may be admitted.

Court adjourned until to-morrow morning at ten o'clock.

THURSDAY, *Feb. 11th*, 1886—ten o'clock a. m.

133 T. A. PERKINS sworn for defendants.

Examined by JAMES N. KIMBALL, Esq.:

Q. What official position, if any, did you hold in this Territory on the 13th day of August last?

A. That of of deputy United States marshal for the Territory of Utah.

Q. Who was the United States marshal for the Territory of Utah at that time?

A. E. A. Ireland.

Q. Are you the officer who levied that execution? (Shows witness papers.)

WIT.: A. I am.

Q. And made that return?

A. I am.

Q. Where was the property set forth in this return, as levied upon by the United States marshal, situated at the time you made the levy, on the 13th of August last?

A. In the Broom Hotel building, on the northwest corner of Fifth and Main streets, Ogden city, Weber county, Utah Territory.

Q. Who was in possession of that property at that time?

A. M. H. Beardsley.

Q. Who had charge of it at that time?

A. M. H. Beardsley, I suppose.

Q. He was the same Beardsley named as defendant in the execution, was he?

134 A. Yes, sir.

Q. What did you do with that property after the sale on the 22nd of August?

A. I delivered it to the purchaser.

Q. Who was the purchaser?

A. The principal purchaser was Mr. John Broom.

Q. You delivered the principal portion of the property to Mr. John Broom?

A. Yes, sir.

Q. After the sale, on the same day?

A. Yes, sir.

Cross-examination waived for the present.

JOHN BROOM sworn for defendants.

Examined by J. N. KIMBALL, Esq.:

Q. Your name is John Broom, is it?

A. Yes, sir.

Q. You are the same John Broom named as defendant in this case of James C. Armstrong against M. H. Beardsley and others; you are the same John Broom are you?

A. Yes, sir.

Q. You were the purchaser on the 22nd of August last of certain property in the Broom Hotel, were you?

WIT.: I don't understand you.

Q. You are the same John Broom who purchased certain property at the Broom Hotel on the 22d of August last, are you?

135 A. Yes, sir.

Q. Under execution sale?

A. Yes, sir.
Q. Upon your purchase of that property what was done with it?
A. It was retained in the hotel.
Q. In whose custody and under whose control?
A. Under mine.
Q. At the time of the purchase, state whether you paid money for the property and to whom.
A. Yes, sir; I paid money for the property.
Q. To whom did you make that payment, and when?
A. I paid it to yourself and Mr. Heywood, in your office.
Q. Any person else present there at that time?
A. Yes, sir.
Q. Who?
A. Mr. Whitaker.
Q. Was not Perkins, the deputy United States marshal, there?
A. Yes, sir; I saw him there.
Q. Was not the payment made to him there in our presence?
A. Yes, sir; I believe it was.
Q. How much money did you pay there, do you remember?
A. Paid thirty-eight hundred and some odd dollars.
136 Q. Three thousand eight hundred and some odd dollars?
A. Yes, sir.
Q. What is that paper? (Hands witness paper.)
A. That is the receipt for the money I paid and for the property I purchased—a bill of sale, I should judge.

Cross-examination waived for the present.

KIMBALL: I offer in evidence this instrument, bearing date the 22nd day of August, 1885, and being certificate of sale of the property sold at the Broom Hotel to Mr Broom on the 22nd of August last under the execution heretofore introduced in evidence, a copy of which is herein attached and made a part hereof, marked Exhibit "A."

COURT: It may be admitted subject to the same objection.

Plaintiff's counsel except.
Marked "Def'ts' Exhibit A."

M. H. BEARDSLEY sworn for defendants.

Examined by JAMES N. KIMBALL, Esq.:

MARSHALL: I would ask whether the Commercial National Bank has produced those deeds I required yesterday.
Mr. Hill presents deeds to Mr. Marshall.

Q. Where did you reside during the years of '83, '84, & '85?
A. In Ogden—in this city.
Q. What business were you engaged in?
137 A. Hotel-keeping.
Q. Hotel-keeping in Ogden city?
A. Yes, sir.
Q. In what hotel, Mr. Beardsley, in 1884 & 1885?

A. Keeping the Broom Hotel, and part of the year 1884 I kept the Depot Hotel.

Q. Are you the same Mills H. Beardsley who was defendant in the case of the Utah National Bank of Ogden against Mills H. Beardsley?

A. Yes, sir.

Q. State how the debt upon which that suit was brought originated.

WIT.: What suit do you refer to?

Q. I mean the suit of the Utah National Bank against you on the four-thousand-dollar note.

SMITH: We object to that evidence if it should appear that this judgment is not one that the court can consider. We make that objection for the purpose of saving that question. If the judgment should turn out to be worthless, as a matter of course the other testimony would be of no importance and immaterial.

COURT: I — better let it come in at present.

Objection overruled. Exception by plaintiff.

Q. State how that debt originated.

A. I did business at the Utah National Bank. Sometimes
138 I had overdrafts there and sometimes I borrowed money and gave them my note for it. If I remember rightly, it was simply the ordinary debt that would occur in men doing business at a bank—overdrafts, and perhaps owed them some money; anyway, it was for money.

Q. The note set out in the complaint is for four thousand dollars and bears date December the 29th, 1884. State whether that was for a debt owing by you to that bank prior to that time.

A. I presume it was; a part of it, in the ordinary business transactions, may have been an overdraft, and when we came to a settlement I gave them that note for what was due them. I forget. I cannot swear exactly how it did occur; but it was about in that way—an ordinary bank transaction.

Q. On the 17th of February what amount, if any, was due upon that note?

A. I cannot tell you from recollection.

Q. You can — whether as much as twenty-eight hundred dollars was due and unpaid on the note on the 17th of February, 1884?

A. Yes, sir. I remember that amount was the amount I owed the bank, on nearly that amount; it may be that very figure; but I cannot say exactly though, but about that amount—twenty-eight hundred dollars.

139 Q. About twenty-eight hundred dollars?

A. Yes, sir.

Q. What part of that twenty-eight hundred dollars have you paid, if any, since that time, otherwise than by the sale under the execution that has been offered in evidence?

A. Not any.

Q. Neither of interest nor principal?

A. No, sir.

Q. Who was in custody and control of the property in the Broom Hotel on the thirteenth of August, 1885?

A. I was, until twelve o'clock that day—about twelve o'clock.

Q. In whose custody was it after twelve o'clock of that day?

A. The marshal took charge of it.

Q. The United States marshal of this Territory?

A. Mr. Perkins, as deputy.

Q. — ask you to state if he took charge of all the property in the hotel on that occasion.

WIT.: How is that?

Q. — ask you to state if he took charge of all the property in the hotel on that occasion.

A. Yes, sir; he had absolute control of the whole place, excepting my private room.

Q. What claim, if any, did you make to him after he took charge, as to exempt property?

140 A. I made a claim of my exemption under the statute. I told him I should claim what the law would allow me for exemption.

Q. How much did you claim?

A. Five hundred dollars I understood was the amount allowed, and claimed that.

Q. How many members were there in your family at the time you made that claim?

A. My wife and two children and myself were my family.

Q. State what, if any, property was set off to you as exempt from execution. Was any property set off to you by the marshal as exempt from execution?

A. Yes, sir; I spoke to the marshal about it, and he said he thought I better get somebody to make an appraisement on certain property and to get five hundred dollars' worth. We agreed upon Mr. John Boyle. He came there, and he, with the marshal and I, was present part of the time; and when I was not there my wife was there all the time; and the clerk in the office at that time was there, and they found and set off property that they called worth five hundred dollars.

Q. That property was set off separate and apart from the other property?

A. It had been levied upon and the marshal allowed it then to be taken from the——

141 Q. After you made the claim and after Mr. Boyle had appraised the property it was set apart from the other property?

A. Yes, sir.

Q. Went into your control and custody?

A. Yes, sir.

Q. Examine that exhibit and see if you can tell from that what property was set apart for you as exempt. (Hands witness paper.)

A. I would not be able to swear that is the property. I could not identify the property if I was to go into the hotel now and look for it; they did the business, and the understanding was that we were

to get five hundred dollars' worth of property, and that would be the amount exempt from execution.

Q. What was the character of the property selected by you?

A. It was some furniture, bedding, dining-room furniture—some kitchen and dining-room furniture.

Q. Household furniture?

A. Yes, sir.

Q. Table-ware?

A. Yes, sir.

Q. Kitchen-ware?

A. Yes, sir.

Q. What did you do with that property after it came into your control again, if anything?

142 A. I made a proposition to Broom to either take it out of the house or let him have it for five hundred dollars, and he accepted the proposition and paid me five hundred dollars for it, and I never removed it from the house.

Q. What did you do with the property?

A. I turned it over to Mr. Broom.

KIMBALL: Before proceeding with this examination I desire to offer in evidence the deeds that Mr. Hill had not in court yesterday, but which he has produced in court this morning.

SMITH: We object to them as immaterial, irrelevant, and incompetent. We admit the formal execution and waive proof of it.

Objection overruled; exception by plaintiff.

Deeds marked respectively Defendants' "Exhibit- B, C, D, & E," copies of which are hereto attached and made part hereof, marked respectively "Exhibit- B, C, D, & E."

Q. What was the amount of your indebtedness, if any, to the Commercial National Bank of Ogden on the tenth day of January, 1885?

A. About twenty-one thousand dollars, I believe.

Q. Does that include the note for $2,501.00 to James C. Armstrong—that estimate of yours?

A. It would not be twenty-one thousand dollars exclusive of that.

—. That sum you mentioned includes that 2,501 dollars?

143 A. Yes, sir.

Q. Ask if you had a settlement with the Commercial National Bank about that time in which your matters were adjusted in any way.

A. Yes, sir.

Q. State where the settlement was made, who was present, and what was done.

A. It was in the bank; Colonel Harkness was there, Major Laugsdorf, Mr. Hill, Mr. Armstrong, Mr. Buchmuller; may have been others; I don't remember just now.

Q. Who were those gentlemen?

A. Officers of the bank, as I supposed.

Q. They were officers of the bank?
A. Yes, sir.
Q. Acting as such at that time?
A. Yes, sir.
Q. State what was done, Mr. Beardsley.
WIT.: At that meeting?
Q. Yes.
A. They called my attention to the fact that that amount of money was due the bank, and they would like to have securities for it. Before that it had been running simply——
Q. State the shape that entire debt was in, how it was represented and evidenced, how much of an overdraft and how much in notes, and what form the notes were in, as near as you can.
144 A. I could not tell you exactly. It was all in notes, with the exception of what may have been the current account—overdrafts, perhaps a small amount, not a large amount. The balance was covered in notes that I had given from time to time; renewed notes from time to time.
Q. How many notes did they hold of yours?
A. I cannot tell you how many separate notes.
Q. Or just what notes were for other notes that were renewed notes or other notes given from time to time?
A. No, sir.
Q. You cannot tell how many of them?
A. No, sir.
Q. You say your matters were arranged there. State how. What was done in that respect?
A. I told them what property I owned, what real estate and personal property, and told them all I could do would be to give them security upon that property as security for the notes. If they would accept that and extend the time for me I could do that, and did do it.
Q. What proposition, if any, did they make to you with reference to security?
A. I think one or two of them stated they would a good
145 deal rather have the money than anything else. If I could not give them money they would have to take the property. If I could represent property enough they would be willing to take that and extend the time for me on the notes.
Q. Did you at that time give any security?
A. Yes, sir.
Q. What was the character of that security?
A. Real estate in Ogden, real estate in Michigan, real estate in Ohio, and the Broom-Hotel property I owned there—property in the Broom Hotel.
Q. Was there any security given at that time on the Broom-Hotel property?
A. I cannot tell you whether it was done just at that particular time. It was talked of, but I don't remember whether the papers were signed at that particular meeting or afterwards.
Q. State whether or not the real estate on whi- you gave security is the real estate covered by those deeds, "Exhibits B, C, D, & E."

A. That (one of the deeds) is the real estate in Michigan—the farm that I had in Michigan. I suppose it is; I have looked it over. That (another deed) is the real estate in Ohio, and those two deeds are for the real estate in Ogden.

Q. And the other, the mortgage in suit, is for the personal property?

146 A. Yes, sir; and other property.

Q. At that time what other property were you the owner of or possessed of than that covered by those deeds and the chattel mortgage?

A. None other excepting some bank stock.

Q. What bank was that?

A. The Commercial National Bank.

Q. What became of that?

A. I sold it to them afterwards.

Q. So that these deeds and the chattel mortgage you gave covered all your property of every description?

A. Yes, sir.

Q. And were given to secure a debt of twenty-one thousand dollars?

A. Yes, sir.

Q. This arrangement was made by you with the bank?

A. Yes, sir.

Q. At the meeting in the bank where you say those gentlemen who were officers of the bank were present?

A. Yes, sir.

Q. What, if anything, did Armstrong have to do with that transaction, separate and distinct from the other officers of the bank?

A. He held a private note against me of twenty-five hundred dollars. I say that amount because my memory has been re-

147 freshed upon that. I could not say only from what I have heard here; 2,501 dollars—about that amount, anyway, I know it was—and he surrendered that note to me.

COURT: At the time these deeds were given?

A. It was at the time the arrangement was made, and the deeds were made in a day or two and executed—that is, a day or two after the meeting; it might be at the very same meeting. I am not positive of that; anyway, the arrangement was made at that time.

COURT: The arrangement was made for the chattel mortgage at that time?

A. Yes, sir.

Q. Was that twenty-five-hundred-dollar note an additional debt to the twenty-one thousand dollars?

A. No, sir.

Q. State now how those deeds came to be given to individuals, Mr. Beardsley?

A. They asked for them.

Q. And it was at their request you made the deeds to the different parties named in the deeds?

A. Yes, sir.

Q. What was the value at that time, if you know, of the real estate covered by those deeds?

148 Objected to by plaintiff's counsel as irrelevant and incompetent; objection overruled; exception by plaintiff.

A. I calculated and stated to those gentlemen that the property was worth a good deal more than they were taking the deeds for; it cost me more than that.

Q. You mean worth a good deal more at that time than the consideration named in the deeds?

A. Not more than the consideration named in the deeds. I asked that the consideration be put in the deeds. I didn't want to have the appearance on the deeds that the property had depreciated in value.

Q. Was it worth more than the debt for which the deeds were given as security?

A. Because they said they didn't want to buy real estate, and would not take real-estate security unless it was worth more than the actual indebtedness; would not feel safe in taking it.

Q. You mean to be understood as saying that the twenty-one thousand dollars—that the property mentioned in the deeds was worth more than twenty-one thousand dollars?

A. Yes, sir.

149 Q. And so you gave deeds as security for that indebtedness. How did you come to give deeds instead of mortgages?

A. I objected to giving deeds unless they would give me a bond allowing me to redeem all this property at a certain time if I saw fit to do so.

Q. At whose instance were they made in the shape of deeds instead of mortgages?

A. It was a matter that was talked over there. I refused to give deeds until they would secure me against losing possession of the property in case I felt able to redeem it.

Q. The bank officers demanded of you to give deeds?

A. They asked for it and I consented to the transaction.

Q. They consented to put the consideration in excess of the claims that were to be secured?

A. Yes, sir; it was all understood; they had no objection to naming the amount that way; they had no objection to that arrangement.

Q. What were your liabilities, otherwise than to the bank, at this time?

A. I owed the Utah National Bank four thousand dollars at that time; about that amount.

Q. Did that and what you owed the Commercial National Bank cover all your liabilities?

150 A. Yes, sir—that is, there may have been a few little current bills around town; something of that kind; nothing in the way of a large indebtedness.

Q. What was the value of your total assets at that time, if anything, in excess of your liabilities?

A. From my books, my real-estate ledger and other books, I held——

SMITH: We object to the question as irrelevant, and so much of the answer as has been given, and move to strike it out.

COURT: What is the object of the testimony?

KIMBALL: I think it is admissible under the third part of our answer. The third part is that at the time of the transaction Beardsley transferred all of his property, and leaving certain of his debts unprovided for with a view to cover it up.

Objection overruled; exception by plaintiff.

Question read.

WIT. According to my books, about twelve thousand dollars.

Q. What were the liabilities—21,000 and 4,000?

A. Twenty-five thousand dollars.

Q. What is the value of the assets?

A. About thirty-eight thousand dollars—thirty-six or thirty-eight—I have forgotten as to that, but about that.

151 Q. You stated awhile ago that at the time of this transaction these parties gave you back bonds to reconvey to you.

A. Yes, sir.

Q. Were those given at the same time as this transaction?

A. At the same time the deeds were signed.

Q. And delivered to you?

A. Yes, sir.

Q. What has become of them now?

A. I have surrendered them to the Commercial National Bank.

Q. State what, if anything, you did with reference to having those bonds recorded.

A. I did nothing; went home and put them in my safe and kept them there.

Q. Never filed them for record in any of the counties where the real estate was located?

A. No, sir.

Q. Retained in your personal possession in your safe?

A. Yes, sir.

COURT: Was the bond to the Michigan property acknowledged before a notary public?

A. They are all acknowledged.

SMITH: We have the bonds here.

COURT: He could not very well put them on record in Michigan without they were acknowledged.

152 Q. When this present suit was originally begun against you in July last—July 22nd—what understanding, if any, did you have with the plaintiff with reference to judgment being taken in that suit?

A. I had the summons served on me, and three or four days after that I called upon Captain Smith and told him of the circumstance. He said he knew of it, of course. I says, "I can't do any better than to let it go by default and let them take judgment;" and we

figured up the time it would have to run yet, and he says, "I can't take judgment until a certain day." I says to him that Judge Powers was going away on Sunday morning, I understood; that I had a conversation with the Judge, and he left the impression that he intended to leave on Sunday. Captain Smith said that there would be no court in session and he could not take judgment unless he would have another judge come here. I says, "Anyway, it can be fixed right. I am satisfied that is all there is about it."

Q. He said nothing about extending the time?

A. He says if he could not take the judgement it might lie over until the judge came back or another term of court; if the judge was not here they could not take judgment.

Q. Do you know whether the Judge left before that day
153 that the Captain named as the time at which he could take judgment?

A. I think he didn't go within two or three days of the time he first talked of going.

COURT: I left on Wednesday, the fifth of August.

WITNESS: I got the impression he was going away on Sunday.

Q. He didn't leave for two or three days after the time?

A. No, sir; he was here two or three days longer than the time he first talked of going.

Cross-examined by Captain SMITH:

Q. What day of the week was the conversation you had with me, Mr. Beardsley?

A. It was Saturday, I believe.

Q. Do you remember stating to me that the Judge was going away the next morning—Sunday?

A. I stated he was going away Sunday morning; whether it was Saturday I told you that or Friday, I don't know.

Q. That he was going away Sunday morning?

A. Yes, sir. I got the impression from a conversation with him.

Q. This Sunday you mean was the Sunday immediately before Judge Powers did go away?

A. Yes, sir.

Q. What did I say to you about my desire to take judgment on the first day I could get a chance, in that conversation?

154 A. I talked to you about that, and says I, I could not do any better than to let you take judgment. You said it was your duty to your clients and you would take judgment as soon as possible. You didn't think Mr. Armstrong or the Commercial National Bank wanted to distress me at all, but at the same time, to do your duty to your clients, you must take judgment as soon as possible; and you stated that if there was no court here—if the court was not here—you would not be able to take judgment unless you sent for another judge to come here, and you didn't think to press the matter to that, and to let the matter go over until the judge came back or another term of court.

Q. Didn't I say unless I found I could take judgment when Judge Powers was here, or words to that effect?

A. You may have said that. I don't remember that.

Q. What did you estimate your property to be worth at the time you gave these deeds—the specific pieces of real estate—take the Michigan property?

A. Ten thousand dollars.

Q. You think the Michigan property was then worth ten thousand dollars?

A. Yes, sir; it stood me about eleven.

155 Q. Was it not a fact that Mrs. Beardsley refused to execute the deed or waive dower?

A. Yes, sir.

Q. Would not that reduce the value of the property some, in your estimation—the value of the deed you made?

A. Certainly.

Q. In making this estimate of your assets have you considered how much should go off of the ten thousand dollars you estimate in the Michigan property because of Mrs. Beardsley's right in it?

A. No, sir; I didn't take that into account.

Q. What was the property that was in Ohio worth at that time—the real estate?

A. I gave fifteen hundred dollars for it. When I bought it there was a mortgage on it for four hundred dollars. I bought it subject to that mortgage.

Q. Gave eleven hundred dollars and paid the mortgage off?

A. Yes, sir.

Q. I didn't ask you what you gave for it, but what it was worth on the tenth of January, 1885?

A. Fifteen hundred dollars.

Q. You think it was worth fifteen hundred dollars?

A. Yes, sir.

156 Q. What was your Ogden property worth—the real estate?

A. It is a hard matter for me to say that without referring to my book—quite a number of pieces.

Q. What is your opinion, without asking about your book?

WIT.: The value of those other separate pieces I remember very clearly.

Q. What is your judgment as a business man as to the value of the property—the Ogden property? Was that conveyed to Armstrong?

A. Yes, sir.

Q. I will call your attention to the first piece of property mentioned in this deed—that is, the west half of lot 8 and part of lot 9, in block 2, plot "A," of Ogden city survey. Of course, it is described more particularly, but as it is the west half of it will do.

A. I have a statement in my book; I can give it from this.

Q. Can you give your judgment of the value of that property, independent of your books? I want to know what, in your opinion, was the property actually worth.

A. I don't know what real estate is worth in Ogden. I would not give very much for it—any of it. (Witness figures.) It figures at that time $8,690.00.

Q. What do you say it was worth at that time?

157 A. It was worth that to me.

Q. What was it worth in the market—what was the fair market value of the property at that time?

A. Eight thousand dollars.

Q. Do you mean that for all the property in this deed to Armstrong or for this west half of lot 8, in plot "A," of Ogden city survey, block 2—each of those pieces in that deed? I would like to have you put a separate value on each piece described in that deed to Armstrong.

A. It is a hard matter to fix my mind on each particular piece as they are described here.

Q. I should be glad to have you take the time to — it, fix your mind on the piece, and give me the separate value of each lot.

WIT.: I would like to ask Mr. Nelson if he can tell by this description where this property is located?

(Mr. Nelson describes to witness where the property described in the deed is situated.)

WIT.: The deed is made up of 7 or 8 parcels of ground, all embraced in one deed; now, for that reason, I cannot recollect distinctly——

Q. Now that you know what those descriptions are, I wish you to give your valuation of each particular part in that deed—that deed with the consideration of twenty-five hundred dollars.

WIT.: I can give you the valuation of the whole.

158 Q. I don't want that.

A. Two rods I bought at one time. I bought one man out to get a right of way.

Q. Is it not a fact, Mr. Beardsley, that you have given in this estimate of the value of that property what it cost you rather than what it was actually worth—all of the property you had on the tenth of January, 1885; haven't you given what that property cost you in your estimate?

A. When I stated my assets were twelve thousand dollars more than my indebtedness, I did.

Q. That is the way you figure that—figured up what the property had cost you, not exactly what it was worth?

A. Yes, sir.

Q. I wish you to look at these agreements or bonds, being the ones made contemporaneously with these deeds that have been introduced in evidence; see if you identify them as the bonds that were given contemporaneously with the deeds.

A. I think they are the same; I kept them a year or more; they are the same.

Q. You have surrendered them to the Commercial National Bank, I believe, or to the parties by whom they were given?

A. Handed them to Mr. Hill, cashier.

Q. At what date did you surrender those obligations to Mr. Hill?

159 A. It was when I was in Ogden last, two weeks ago.

Q. About two weeks ago?

A. Three weeks ago.

Q. What else did you do besides surrender those obligations at that time?

A. He asked me to sign a quitclaim deed; I wanted to know the object of that; I didn't see any object in that one way or the other, so I signed it. I told them I had given a warranty deed, and didn't see any object in giving a quitclaim deed, but I did so, and they gave me notes of $14,500.

Q. That is two weeks ago?

A. About two weeks ago—two or three weeks ago.

WIT.: I would like to make a statement to Mr. Marshall if the court has no objection.

You intimated in your remarks that there was a sort of covering up, with an idea of defrauding the Utah National Bank. I want to say to you that when I did this transaction, executed those papers, that I spoke of that four thousand dollars' indebtedness, and insisted that the bank should take that; they were taking sufficient property from me as security, and I insisted they should take care of that debt; they said they would not assume the debt, but would take care of me; they would take care of that debt for me if I was pressed.

160 Mr. MARSHALL: Who said that, officers of the bank?

A. Yes, sir.

Q. At the time you made these deeds?

A. Yes, sir.

WITNESS: I don't want the impression to go out in this community that I was trying to defraud the Utah National Bank.

Q. I want you to make a statement of what was said between yourself and the directors, at the time this transaction was made, on that subject.

A. I spoke of that indebtedness and said I owed four thousand dollars to the Utah National Bank, and I would like to have that taken care of. I was giving them ample security.

Q. Did you state to them you were giving all your property to them?

A. Yes, sir; named everything I owned, with the exception of the bank stock.

Q. What was the amount of that bank stock?

A. One thousand dollars.

Q. What afterwards became of that bank stock? That was stock in that same bank—the Commercial National Bank?

A. Yes, sir. Afterwards I wanted to pay the Utah Na-

161 tional Bank as much as I could and I gave them two thousand dollars in cash, and then I gave them an order for the bank stock. Dooley, R. M. Dooley, went to the bank and asked for that stock and they refused to give it to him and put him off until

they saw me, and said they would take the bank stock; they didn't want it to get out of their hands. I said I intended to pay the Utah National Bank one thousand dollars on the account. Mr. Buchmiller and Langsdorf——

Q. Were they directors of the bank?

A. Yes, sir; they went and signed a note with me at the Utah National Bank for one thousand dollars for four months; gave me credit at the Utah National Bank for one thousand dollars. At the end of four months I could not pay the note, and went and paid the interest and surrendered the bank stock to the Commercial National Bank, and then I drew a check on them for one thousand dollars to give the Utah National Bank. I reduced my in-
162 debtedness in that way twelve hundred dollars after I had given this property to the other bank.

Recross-examined:

Q. Do you know that the directors of the Commercial National Bank or the parties to whom you gave these securities offered the Utah National Bank to turn over all those securities if their debt should be paid, with your consent?

Objected to by defendants' counsel as immaterial and irrelevant; objection sustained; exception by plaintiff.

SMITH: What we offer is that about the time or shortly after this security was taken by the Commercial National Bank or its officers that they, with the consent of Mr. Beardsley, made an offer to the Utah National Bank that they would turn over all those securities to that bank provided they would assume the indebtedness for which the securities were given.

COURT: That was a transaction between the two banks; that has nothing to do with this case.

Plaintiff's counsel excepts to the ruling of the court.

163 COURT: I permitted the statement to be made by the witness because of the fact that some one might attempt to draw the reduction that Mr. Beardsley was not an honest man. I think it may have some slight bearing on the faith of the transaction. While it does not seem to me to be very material, it tends in that direction, as bearing upon the question of the good faith of the transaction; it may possibly have some tendency to prove that.

MARSHALL: I will withdraw my objection to the evidence.

(Question read.)

A. Yes, sir; Mr. Armstrong told me — would be very glad to let them take their place.

Q. What one of the directors of the bank told you that they would take care of you in regard to the debt of yourself to the Utah National Bank?

A. Major Langsdorf and Colonel Harkness both expressed themselves in that way; if it was crowded they would see I was not distressed.

Q. When did they make that expression?

A. The night of the meeting in the bank, when we fixed up the papers and came to the understanding.

164 Q. Who was present when Langsdorf and Harkness made that statement?

A. We were all in the room together.

Q. Whom do you mean by "all?"

A. The same parties I have mentioned as being present at the meeting before.

Q. I would like to have you name them again.

A. Mr. Harkness, Langsdorf, Hill, Armstrong, and Buchmiller; may have been some others. I don't remember the others now.

Q. What time a day was it?

A. It was in the evening, after eight o'clock—probably eight or nine o'clock in the evening.

Redirect examination:

Q. How do you know who that officer was of the Utah National Bank to whom it was said that if the Utah National Bank would assume the indebtedness of yourself to the Commercial National Bank that they would transfer the property they held, personal and real, to that bank?

A. I heard Mr. Armstrong tell Dick Dooley so.

SMITH: Who was Mr. Dooley at that time? What capacity did he act in reference to the Utah National Bank?

A. I think he was cashier.

KIMBALL: What position did Harkness occupy in the Commercial National Bank at the time you say he made the state-
165 ment that if you were crowded the bank would take care of the Utah National Bank?

A. The president of the bank.

Q. What position did Major Langsdorf occupy at that time?

A. I understood, general manager and the vice-president. He seemed to be the general manager of the bank at that time.

KIMBALL: I offer in evidence chattel mortgage from John Broom to E. A. Whittaker, dated the 22nd day of August, 1885.

MCBRIDE: We object to it on the ground that it was after the suit was brought to foreclose our mortgage and our lien, if any we had, had attached.

Objection overruled; exception by plaintiff; marked Defendants' "Exhibit F."

JOHN BROOM recalled for defendants.

Q. You may state what you did with this chattel mortgage on its execution—the chattel mortgage from Broom to Whitaker.

A. I gave it to Mr. Whitaker.

Q. State what business transaction led to the execution of that mortgage.

A. How is that?

Q. State whether at the time of the execution of this mortgage you gave your note to Mr. Whitaker.

166 A. Yes, sir.

Q. What did Mr. Whitaker give you, if anything, as consideration for it?

A. He gave me nothing for it.

Q. Did he give you any money?

A. No, sir.

Q. He didn't? Didn't he give you $4,131.00?

167 A. Yes, sir.

Q. Where at?

A. At your (Kimball's) office.

Q. At the office of Kimball and Heyward?

A. Yes, sir.

Q. And you then gave him this note?

A. Yes, sir.

Q. And the mortgage to secure it?

A. Yes, sir.

Mr. MARSHALL: I presume the gentleman will admit that the indebtedness that is represented in the note, judgment, and execution, originated, a portion of it, so early as 1883, for money advanced at that time and money loaned and used from time to time, until it aggregated four thousand dollars, on which this one thousand dollars was paid that Mr. Beardsley testified too, leaving a balance of some 2,800 or 3,000 dollars, on which judgment was obtained. If the gentleman will admit that evidence we will close.

SMITH: We will admit that.

COURT: Just note, Mr. Reporter, that the statement as made is admitted.

Recess until two o'clock p. m.

168 TWO O'CLOCK P. M.

T. A. PERKINS recalled by defendants:

Q. You may state what "Exhibit B," attached to that execution, is.

A. "Exhibit B," upon the return of this execution, is a list of the property exempted from levy in this action upon the claim of the defendant Beardsley.

Q. What did you do with that property at the time Mr. Beardsley made the claim?

A. The property was appraised, exempted upon his claim, and delivered to him.

Q. Is the identical property that was delivered to him the property described in that Schedule "B?"

A. It is.

Defendants rest.

OSCAR E. HILL recalled for plaintiff:

SMITH: I desire, before proceeding with Mr. Hill, to put in evi-

dence the undertaking for reconveyance of this real estate, executed by James C. Armstrong, dated the tenth of January, 1885, marked Plaintiff's "Exhibit No. 3," and a copy of which is hereto attached and made a part hereof, marked Exhibit No. 3; one by Oscar
169 E. Hill, dated the same date, marked Plaintiff's Exhibit No. 4 (a copy of which is hereto attached and made a part hereof, marked Exhibit No. "4.")

And one by Jessie M. Langsdorf, dated the same dated, marked Plaintiff's Exhibit No. 5 (a copy of which is hereto attached and made a part hereof, marked Exhibit No. 5).

COURT: They may be admitted subject to any objections counsel wish to make.

Q. Are you familiar with the real estate mentioned in the conveyance by Mr. Beardsley to yourself, which has been put in evidence here, and being the same real estate mentioned in your contract to reconvey within a year—are you familiar with the real estate—know where it is?

A. I only know from being told and from the description in the deed; never saw the real estate.

Q. Are you acquainted with the value of real estate in this city?

A. Partly; but that is not in this city.

Q. Where is that real estate, in the country?

A. In Akron, Ohio.

170 Q. Do you know what the value of that real estate is?

A. Only by repute.

Q. From whom did you learn or hear of its value?

A. Mr. Beardsley and one of the banks in Akron, Ohio.

Q. What was the value of that property, if you can say, at Akron, Ohio?

Objected to by counsel for defendants; objection sustained; exception by plaintiff.

Q. Are you acquainted with the property mentioned in the deed to Langsdorf and which has also been described in one of the contracts which has been introduced in evidence for its reconveyance by Langsdorf?

A. I am only acquainted with it in the same way.

Q. Where is that property?

A. In the State of Michigan.

Q. Are you acquainted with the property embraced in the two deeds to Mr. Armstrong that have been placed in evidence, being the same property also described in the one contract for reconveyance that has been introduced in evidence?

171 A. Yes, sir; I have seen it.

Q. Where does that lie?

A. In different portions of Ogden city and outside of the corporate limits.

Q. Are you familiar with the values of real estate in and about Ogden city?

A. I have my opinion of them.

Q. Had some experience in learning and ascertaining the values of real property in and about Ogden city?

A. Some experience.

Q. How much?

A. I don't know hardly how to answer that. I have bought and sold and taken mortgages.

Q. What was the value of the real estate mentioned in the two deeds to Armstrong on the tenth of January, 1885?

WIT.: I should have to figure up a little.

Q. All right; take your time. (Witness figures.)

A. I should think in the neighborhood of 6,500 or 7,000 dollars.

Q. Upon the payment of what sum was it to be reconveyed, do you remember? If not, refresh your recollection by looking at the paper.

172 WIT.: What is the question?

Q. What sum was to be paid by Beardsley for a reconveyance of that property?

Objected to by counsel for defendants; it is not competent.

WIT.: Six thousand dollars, I think.

Q. Now, I would call your attention to the Michigan property and state to you, preliminary to another question, what the consideration of that is, what the consideration for the reconveyance was. To whom was the Michigan property conveyed, to Mr. Langsdorf?

A. Yes, sir.

Q. This provided that for the sum of eight thousand dollars the land should be reconveyed and the third one, being the one to you, provides for the sum of five thousand dollars—14,500. Now, there is 8,000 dollars in the mortgage to Mr. Armstrong, that is 22,500 dollars; the indebtedness had been stated by Mr. Beardsley to be about twenty-one thousand dollars. Can you explain this in any way so as to show where that discrepancy comes in? Do you know anything about it?

173 A. I think the indebtedness to the bank—the total indebtedness of Mr. Beardsley—was about $20,500. These deeds were given or made on the tenth of January, and the mortgage to Armstrong was not made until the 14 of January, and Mr. Beardsley had given us a deed of the Michigan property at eight thousand dollars, and when we came to get the signature—to request the signature—of Mrs. Beardsley for the right of dower she refused to give it; then, of course, that would have to come out.

Q. You made arrangements with Mrs. Beardsley for that to come out and the two thousand to be added to the chattal mortgage?

A. Yes, sir; took that out and added it to the chattal mortgage.

Q. Were you present when the arrangement was made whereby these deeds were taken from Mr. Beardsley by you and Mr. Armstrong and Langsdorf?

A. Yes, sir; I was.

Q. What, if anything, was said by any person there—any officer of the bank—in regard to carrying Mr. Beardsley on his indebtedness to the Utah National Bank?

174 A. Nothing that I know of. I didn't hear anything said about carrying Mr. Beardsley at that time.

Q. What office did you hold in the bank at that time?

A. I was cashier.

Q. Were you present through the whole evening?

A. Yes, sir; I was.

Q. Heard nothing of the kind?

A. No, sir.

Q. Did the bank agree to carry Beardsley in regard to the Utah National Bank?

A. Not that I know of.

Q. You stated yesterday that the deeds to you of the Akron property have a consideration of fifteen hundred dollars. Will you examine that deed and see what the actual consideration is?

A. I have examined it since I stated fifteen hundred dollars. I knew it was more than the note; the amount I did not remember; but the amount in the deed is one thousand dollars.

Q. Do you know that Mr. Beardsley has made quitclaim deeds to the parties to whom these former warranty deeds were given?

A. Yes, sir.

175 —. Do you know the consideration of the whole matter between the parties and Mr. Beardsley as finally settled between them when these deeds were given?

Objected to by counsel for defendants as not being in rebuttal.

COURT: He may answer whether he knows.

A. Yes, sir; I think I know.

Q. What was the consideration?

Objected to by counsel for defendants as immaterial, not rebuttal, and not the best evidence.

SMITH: I desire to show that the actual value of this property in regard to which these deeds of warrants were given, its real value, as agreed on between all these parties, is much less than these claims they had bound themselves to reconvey for to show the exact figures, while, of course, if we had the quitclaim deeds here it might be good evidence as to what they show; they might or might not show the actual consideration; I do not remember that; I do not know; they are on record, however, but two of them are out of the jurisdiction of the court.

176 COURT: I do not think the quitclaim deeds have anything to do with the transaction.

Cross-examined:

Q. At the time of this transaction in which he gave the deeds who was the president and vice-president?

A. Mr. Armstrong and myself.

Q. I asked you who was the president and vice-president of the bank at that time.

A. Mr. Harkness was the president and Mr. Langsdorf the vice-president.

J. C. ARMSTRONG recalled for plaintiff:

Q. Are you acquainted with the value of the property, the real property, that was conveyed to you by Mr. Beardsley on the 1st of December (January), 1885?

A. Pretty well acquainted with the value of it.

Q. Have you dealt in real estate in and about Ogden?

A. I have.

Q. And been observant of the dealing of others in real estate so as to know its value?

A. I think I am pretty well posted in regard to the values.

177 Q. Were you so posted about the tenth of January, 1885?

A. I was.

Q. What was the value of that real estate on the tenth of January, 1885?

A. As to the exact value I could not say, but I judge from 6,500 to 7,000 dollars—probably 6,800 dollars.

Q. What is the value of that real estate now?

Objected to as not material; objection sustained; exception by plaintiff.

Q. Was property rising or declining in value about the tenth of January, 1885?

A. Property was sinking in value.

Q. Do you know the value of the property in Michigan that was conveyed to Mr. Langsdorf?

A. I never saw the property; only from hearsay and from the description.

Q. Do you know the value of the property that was conveyed in Akron, Ohio?

A. I do not.

RANSFORD SMITH recalled for plaintiff:

Q. Were you present at the time when the chattal mortgage was given?

A. I was.

178 Q. When was that?

A. On the 14th day of January, 1885, along in the evening, about 8 or 9 o'clock, I think.

Q. That is the same date as the mortgage?

A. The deeds were made ten days before; that is the same date as the chattel mortgage.

Q. Had you anything to do with the meetings and those deeds?

A. I hadn't; only drew the chattel mortgage and the note accompanying it.

Q. State what occurred there, to your knowledge.

Objected to by defendants' counsel: That is a part of the case they went into in chief, and is not rebutting.

COURT: I do not think it is rebutting, but I am inclined to admit it.

Exception by defendants.

Q. Who was present and what took place?

A. Mr. Beardsley, Mr. Armstrong, Mr. Hill, and myself, and I think Mr. Langsdorf was present at that time, and they did a good deal of ciphering, and the note was to be drawn for six thousand dollars. When Mr. Beardsley agreed, Mr. Beardsley said—no, Mr. Armstrong or Mr. Buchmiller—I think Mr. Buchmiller was present—said that the Michigan property was not sufficient
179 security for eight thousand dollars, since Mrs. Beardsley would not sign away her right of dower, and it was then agreed they should reconvey for two thousand dollars less on the eight thousand dollars in the Michigan property, and that the note in the chattel mortgage should be given for the eight thousand dollars. That was the contract made at that time. I heard nothing there stated about carrying the Utah National note or debt.

Q. I want to ask you about the interview with Mr. Beardsley in relation to the proceedings pending in court for the foreclosure of the mortgage. Did you take those proceedings?

A. Yes, sir.

Q. Brought suit?

A. Yes, sir; brought suit. My recollection is Beardsley would be in default on Monday or Tuesday, I don't know just which, and on Friday or Saturday he came to my office and he stated to me that he didn't know exactly what to do. I stated I could not advise him; that I was counsel upon the other side, and he stated that Judge Powers had determined to go home on Sunday, which was before the default could have been taken or any application could have been made to the court for the relief demanded.
180 I said to him, "In that event, Mr. Beardsley, I do not think that you will be troubled until Judge Powers comes back; it might be that Mr. Armstrong would desire to have another judge brought into this district to have an application for a receiver, but I think not; but when Judge Powers came back I should push the matter, and in the meantime, if there was an opportunity, I should take judgment the first day that I had an opportunity or chance. I omitted to learn or ascertain that there would be a session of the court on Tuesday, I believe it was the day after the election, and I presume upon that day I might, had I been in attendance upon the court, have taken a default and applied to the court for the relief demanded.

Q. Did you know of it at the time?

A. I did not know of it at the time, though ninety days of the date of the deed becoming due—the chattel mortgage—had not then, on that fourth day, or for some time afterwards expired.

Q. Did you make any agreement of any sort with Mr. Beardsley at that time to continue that case until the following term of court?

A. I positively declined and refused to make any agreement of the kind with him.

Q. Did you make any agreement at the time you would not take judgment?

181 A. Not any at all.

Q. On the contrary, you told him you would take judgment on the first opportunity?

A. On the first opportunity I had.

Q. Had you any directions from your clients in regard to that matter?

A. Not at all; the matter was handed to me for collection without instructions; simply they wanted it put through and collected; the idea I had was they were tired of holding it and wanted it collected.

Cross-examined by JAMES N. KIMBALL, Esq.:

Q. Were you not present at the meeting at which the deeds were arranged for?

A. No, sir.

Q. You know nothing about what occurred between the bank officers and Mr. Beardsley at that meeting?

A. No, sir; I do not; I was not present at all.

Q. When was it you took default against Beardsley?

A. The day before yesterday or the day before that; on the 21st of September, the first day that there was any court after the fourth of August, I obtained an order for leave to file a supplemental and amended complaint and to make new parties, and I had service upon them generally, the clients represented by you gen-

182 erally, who have not been in default, but Beardsley has been in default up until yesterday, when we took his default in the beginning of this case.

JAMES C. ARMSTRONG recalled for plaintiff:

Q. Were you present at the time the deeds were made, bearing date the tenth of January, 1885?

A. I was.

Q. Who was present on that occasion?

A. There was Mr. Langsdorf, Buchmiller, Hill, and myself. I don't remember whether Mr. Harkness was there or not. I don't think that he was.

Q. What do you know, if anything, in regard to an agreement, verbal or otherwise, whereby the debt of four thousand dollars or thereabouts from Beardsley to the Utah National Bank should be carried, if he was pressed for it, by your bank?

A. I don't know anything about it. I do not remember anything of the kind being spoken of. Beardsley wished us to take that claim and we positively refused to take it, so far as my recollection is; it is possible Mr. Harkness was there. I am not certain whether he was or not.

Q. Did you ever agree to carry Mr.——

COURT: I don't think there is any testimony in the case that he ever agreed to.

Cross-examined by Mr. KIMBALL:

Q. You say you don't remember whether Mr. Harkness was present or not?

183 A. I could not say positively that he was or was not.

Q. Don't you remember that a certain matter of Bishop & Schaeffer's with the bank was adjusted at about the same time?

Objected to by counsel for plaintiff; objection overruled; exception by plaintiff.

A. I think it was afterwards—a little later than this meeting; this meeting was about the tenth of January.

Q. I don't mean on that exact date, but about that time.

A. He might have been a day or two before or a few days afterwards.

Question read.

WIT.:

A. Yes, sir.

Q. And that Mr. Harkness was here at that time and for a day or so before?

A. Yes, sir.

Q. And was not the Bishop and Schaeffer matter adjusted on the twelfth of January?

A. I could not say whether it was on the 12th or not; I was out of town at that time.

Q. He was here a day or so before the Bishop and Schaeffer matter was adjusted?

A. I know I was not in town when that matter was adjusted.

Q. You went away after the tenth and before that time?

184 A. I may have been in the country, but the Bishop and Schaeffer matter was adjusted when I was out.

Q. You say Harkness was here before the Bishop and Schaeffer matter was adjusted?

A. Yes, sir.

(Plaintiff rests.)

KIMBALL: I would state this, and unless the gentlemen will admit it, I will put in proofs that the Bishop and Schaeffer matter was adjusted on the 12th of January, as shown by the records of this court. If the gentlemen desire it I can be sworn in regard to that myself.

SMITH: You need not be sworn. I will admit that fact, that the Bishop and Schaeffer assignment was dated on the 12th.

SMITH: One other point: I had almost made an arrangement to agree on the facts, and I guess we can. We desire to show and it will probably be admitted, that there was a vacancy in the office of judge of this district and of the supreme court of the Territory, that office being held by Judge Emerson, as associate justice of the supreme court and assigned to this district, which vacancy began

on the 16th day of March, 1885, and continued until the second day of May, 1885, before any judge was assigned to this district.

COURT: I suppose the court would take judicial notice of that fact. The fact is admitted by counsel.

185 The foregoing is all the evidence offered or introduced in said action.

On July 3rd, 1886, defendants Broom and Whitaker gave and served on plaintiff's counsel and filed notice of their intention to move for a new trial in said cause, a copy of which and the endorsements thereon is hereto attached and made a part hereof, marked Exhibit "M."

On July 7th, 1886, on application of def'ts Broom and Whitaker, the court made an order extending the time to prepare and serve their statement, a copy of which order is hereunto attached and made *made* a part hereof, marked Exhibit "N."

Specifications of Errors of Law Occurring at the Trial and Excepted to by the Defendants, John Broom and E. A. Whitaker.

1st. The court erred in permitting the plaintiff to introduce in evidence the chattel mortgage (Plaintiff's "Exhibit No. 2") from defendant Beardsley to plaintiff against defendants Broom and Whitaker, because the same is and was immaterial as to them, their rights to the property in controversy having accrued subsequent to the expiration of the mortgage as to third parties, it having at the time Broom and Whittaker acquired their title ceased to to be a lien upon the property conveyed by it as to the creditors of defendant Beardsley and as to subsequent purchasers and mortgages.

186 2nd. The court erred in permitting witness Ransford Smith to answer the question "Did you ever give them (meaning defendants Broom and Whitaker) any notice of the lien of the claim on which this suit is brought?" To be more specific, I will say of the note and mortgage on which this suit is brought, because the same is immaterial and irrelevant, in this, defendant Broom and Whitaker acquired their title to the property under execution sale and under a levy made on August 13th, 1875. When they purchased their title related back to the levy and carried with it all the right and title acquired by the plaintiff in the execution by the levy. Neither notice to the marshal on the day of the levy or after, or to defendants Broom and Whitaker on the day of sale, would affect the levy or lien acquired thereby nor the title acquired by them under the levy and sale.

3rd. The court erred in refusing to strike out the evidence of Ransford Smith as to the notice given the officer on the 13th day of August, 1885, after the levy of the execution in the case of the Utah National Bank of Ogden, *vs.* M. H. Beardsley, and as to the notice given defendants Broom and Whittaker at the time of the sale, on August 22nd, 1885, because the same was and is im-

187 material and irrelevant, being subsequent to the levy of the execution, and not to the plaintiff in the execution, and therefore would not affect the title of defendants Broom and Whitaker.

Specifications of Particulars in Which the Evidence is Insufficient to Sustain the Findings and Justify the Decision of the Court.

The finding "that note mentioned in complaint was for full value" is not sustained by the evidence, the evidence showing said note was given without any consideration whatever.

The finding "that there was due at commencement of this action and at the time of filing amended and supplemental complaint herein $7,800, principal of said note, and interest thereon, at one per month, from July 14th, 1885, and $780.00, the cost of collection from Beardsley to Armstrong," is not sustained by the evidence, there being no evidence on that point whatever, or that there was anything due thereon.

The finding "that plaintiff is the lawful owner of said note and mortgage" is contrary to the evidence, the evidence showing that the Commercial National Bank of Ogden is the owner and holder of said note and mortgage and always was.

The finding "that the Commercial National Bank of Ogden was not at commencement of this action and has not since been
188 and is not now the owner and holder of said note and mortgage or either of them" is contrary to the evidence, the evidence showing that the said bank was at all times the holder and owner of said note.

The finding "that defendants, John Broom and E. A. Whitaker, have no interest nor has either of them any interest in the personal property described in complaint and in Schedule 'A' of stipulation, filed herein Oct. 3rd, 1885, except such interest as is subject to the claim and lien of plaintiff by virtue of said (his) chattel mortgage and of the proceedings in this suit" is contrary to the evidence, the evidence showing that Broom was an innocent purchaser of that property in good faith and for adequate consideration and after the alleged lien of said mortgage had become extinct and at a lawful sale under a valid levy of said goods and at a time when said goods were subject to such levy and sale as the goods of Mills H. Beardsley and, as to said levy and sale, free from all incumbrances, and that the full title thereto then and there passed to said Broom unincumbered in any way, and that said Broom subsequently gave the note and mortgage mentioned to said Whitaker, and the latter from that time had a first lien on said goods.

189 The finding "that the purchase by said Broom of said property was subject to a lien of chattel mortgage of plaintiff" is contrary to the evidence, the evidence showing that the plaintiff's pretended lien had become extinct by lapse of time.

The finding "that chattel mortgage of Whitaker is and was taken subject to lien of plaintiff's chattel mortgage" is contrary to the the evidence, the evidence showing that Broom at the time of mortgage to Whitaker had complete and unincumbered title.

The finding "that defendants Broom and Whitaker or either of them had notice, prior to them or either of them acquiring rights or interest in said property, of the commencement of this suit, and

that Broom had such notice prior to the expiration of said 90 days" is contrary to the evidence, the evidence not showing that either had any such or any notice.

The finding "that Broom and Whitaker each had constructive notice of commencement of this suit" is contrary to the evidence, there being no evidence whatever on that point.

The finding "that Beardsley did not, with a view to hinder or delay said Utah National Bank of Ogden, make to plaintiff the note and mortgage or either of them described in the complaint, and
that said note and mortgage were upon full consideration
190 moving from plaintiff, and that this action was not commenced to perpetuate plaintiff's mortgage with intent to prevent a levy on said property by said bank, nor to protect said property from sale under execution, and that plaintiff did not refuse to take his judgment, and that plaintiff did not agree with Beardsley that he would do nothing in said suit until the November term, 1885, of this court; that the plaintiff has done nothing with intent to hinder or delay said Utah National Bank or any other creditor of Beardsley in the collection of its or their indebtedness against him," is all contrary to the evidence, the evidence showing that on January 14th, 1885, or shortly prior thereto, Beardsley conveyed all of his property to the Commercial National Bank of Ogden, and that the goods mentioned in plaintiff's pretended mortgage were all the property Beardsley had left, although having prior thereto transferred as aforesaid property to the amount of about thirty thousand dollars to said bank, although owing them less than twenty thousand dollars, and said pretended mortgage was really to said bank and thereby tied up every dollar's worth of property he had, thus disposing of his property with intent to hinder, delay, and defraud his other creditor, the said Utah National Bank of Ogden; and the evidence further shows that there was an
191 arrangement between Beardsley and plaintiff and said Commercial National Bank that the suit herein for foreclosure should be dormant, and said latter bank take no farther immediate steps to foreclose the same, but would attempt to hold the lien, and thereby further hinder and delay said Utah National Bank and so defraud it in its lawful attempt to collect its claim, and that these transfers as aforesaid were made by collusion of said plaintiff, who was also vice-president of said Commercial National Bank, and said Beardsley fraudulently to hinder, delay, and defraud the said Utah National Bank in the collection of its said debt, and that in compliance with said collusion and fraud plaintiff wilfully and intentionally allowed the judge to go East and court to adjourn without taking judgment against Beardsley.

JAMES N. KIMBALL, A. R. HEYWOOD,
MARSHALL & ROYLE,
Att'ys for Defendants, John Broom and E. A. Whitaker,
By J. N. KIMBALL.

I, the undersigned, judge of the first judicial district court of the Territory of Utah and the judge who tried the case of James C. Arm-

strong *vs.* M. H. Beardsley, John Broom, and E. A. Whitaker, certify that I have examined this statement of the case and that the
192 same is correct, and the same is hereby settled and allowed.

OLANDO W. POWERS,
Judge First Judicial District Court of the Territory of Utah.

Ogden, July 29th, 1886.

"EXHIBIT No. 1" (A. H. W.).

$8,000. OGDEN, UTAH, *January 14th*, 1885.

Four months after date, for value received, I promise to pay to the order of James C. Armstrong eight thousand dollars, payable in U. S. gold coin, at the Commercial National Bank of Ogden, Utah, with interest at one per cent. per month, payable monthly from date hereof until paid, both before and after judgment, and, if not paid at maturity, ten per cent. additional as cost of collection.

Due May 14th, '85. No. 567.

M. H. BEARDSLEY.

(Endorsed:) (margin, Commercial National Bank, Ogden City, Utah). J. C. Armstrong.

Feb. 20, '85, int. paid to Feb. 14, '85, $80.
Mar. 24, '85, do. to Mar. 14, '85, $80.
Apr. 28, '85, do. to Apr. 14, '85, $80.
May 23, '85, do. to May 14, '85, $80.
June 23, '85, do. to June 14, '85, $78.
July 21, '85, do. to July 14, '85, $78.

May 20, '85, p'd on ac. principal, $200.

Exhibit No. 1, A. H. W.

193 "EXHIBIT No. 2."

This indenture, made the fourteenth day of January, in the year of our Lord one thousand eight hundred and eighty-five, between Mills H. Beardsley, a resident of Ogden City, in the county of Weber and Territory of Utah, the party of the first part, and James C. Armstrong, of the same place, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of eight thousand dollars, lawful money of the United States of America, to him in hand paid, does grant, bargain, sell, convey, and confirm unto the said party of the second part and his heirs and assigns the following-described personal property, to wit, all the personal property and furniture and fixtures now used by said party of the first part in carrying on the hotel business in Ogden City, Utah, the same being in the Broom Hotel building, in said city, and being all the personal property in said building (except the property specifically exempt from execution and which does not have to be selected to be exempt; also the provisions and coal

now supplied for running said hotel are to be and are excepted from the operation hereof), the ice in the ice-house on Wall street, in said city, being about 200 tons; also the ice-house behind the Broom Hotel, in said city; also one black horse, called "Jim;" one
194 gray mare, called "Grace," and her colt; 8 buggies, 3 sets of single harness, set of double harness, and one two-seated sleigh. Said property is situated at Ogden City, in the county of Weber and Territory of Utah, and is hereby warranted by the said party of the first part to be free and clear of all incumbrances or adverse claims, and is to be and remain in the possession of the mortgagor.

This conveyance is intended as a mortgage to secure payment of a certain promissory note, bearing date 14th January, 1885, executed by said party of the first part, for the sum of eight thousand dollars, and payable to the order of the said party of the second part four months after date, with interest thereon from date until paid, at the rate of one per cent. per month, payable monthly, and ten per cent. additional as costs of collection if not paid at maturity; and these presents shall be void if such payment be made according to the tenor and effect thereof; but in case default be made in the payment of the principal or interest as in said note provided, or should any person remove or attempt to remove said property or any part thereof from the said county of Weber without first having obtained the written consent of the party of the second part hereto, his legal representatives or assigns, or should the party of the second part, his legal representatives or assigns, at any time deem himself unsafe or insecure, then the said party of the
195 second part, his legal representatives or assigns, are hereby empowered to take the said property or any part thereof, wherever the same may be found, and safely keep the same, at the expense of the said party of the first part, until the note secured hereby becomes due; and if it is not paid at maturity, then proceed to sell said property in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making said sale and ten per cent. for attorneys' fees, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

M. H. BEARDSLEY. [SEAL.]

Signed, sealed, and delivered in the presence of—

RANSFORD SMITH.
O. E. HILL.

TERRITORY OF UTAH, } ss:
County of Weber, }

Mills H. Beardsley, the party of the first part hereto, and James C. Armstrong, the party of the second part hereto, being first duly

sworn, say the within and foregoing mortgage is made in
196 good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor.

M. H. BEARDSLEY.
J. C. ARMSTRONG.

Subscribed and sworn to before me this 14th day of January, 1885.

RANSFORD SMITH,
[SEAL.] *Notary Public.*

TERRITORY OF UTAH, } ss:
County of Weber, }

On this 14th day of January, A. D. one thousand eight hundred and eighty-five, before me, Ransford Smith, a notary public in and for said county, personally appeared Mills H. Beardsley, personally known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office, in Ogden City, Utah Territory, the day and year in this certificate first above written.

RANSFORD SMITH,
[NOTARIAL SEAL.] *Notary Public.*

197 (Endorsed:) Exhibit No. 2 (A. H. W.). Chattel mortgage from M. H. Beardsley to J. C. Armstrong. Dated 14th Jan'y, 1885. Filed for record January 17th, A. D. 1885, at four o'clock p. m. Recorded in Book one on Chattel Mortgages, pages 43 & 44. F. J. Cannon, county recorder, by John Harner, deputy recorder.

EXHIBIT No. 3."

Know all men by these presents that I, James C. Armstrong, of Ogden City, Utah, am held and firmly bound unto Mills H. Beardsley, of the same place, in the full sum of twelve thousand dollars; which sum well and truly — pay I bind myself, my heirs, executors, and assigns, firmly by these presents.

Sealed with my hand and dated this 10th day of Jan., 1885.

The condition of this obligation is such that whereas the said James C. Armstrong has sold to the said Mills H. Beardsley the land described in Schedule "A," hereto annexed (and which is made a part hereof), and agreed to convey the same in one year from the date hereof, for and in consideration of the sum of six thousand dollars:

Now, if the said James C. Armstrong shall, on or before the 10th day of January, 1886, make, execute, and deliver to the said Mills H. Beardsley a good and sufficient warrantee deed of said lands, conveying to the said Mills H. Beardsley an unincumbered
198 title in fee simple therein, provided the said Mills H. Beardsley shall on or before that day have paid to him, the said

James C. Armstrong, the full sum of six thousand dollars, above specified, and interest, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof I have hereunto set my hand and seal the day and year above written.

JAS. C. ARMSTRONG. [SEAL.]

In the presence of—
J. M. LANGSDORF.

SCHEDULE "A."

Description of Real Estate Referred to in Foregoing Bonds.

Certain lands in plat "A" of Ogden City survey, as follows: The west half of lot eight (8) and a part of lot nine (9), in block two (2), of said plat, described as follows: Beginning at the northwest corner of said lot nine (9), thence west four rods, thence south five (5) rods, thence east four (4) rods, thence north five (5) rods to place of beginning; also a part of lot six (6), in block nine (9), in said plat described as follows: Beginning at the southwest corner of said lot six (6), thence north forty-four (44) feet, thence east five (5) rods, thence south forty-four (44) feet, thence west five (5) rods to beginning; also a part of lot nine (9), in block thirteen (13),
199 in said plat "A;" beginning twelve (12) feet south of the northeast corner of said lot, thence south six (6) rods, thence west thirteen and one-half (13½) rods, thence north six (6) rods, thence east thirteen and one-half (13½) rods, thence north six (6) rods, thence east thirteen and one-half (13½) rods to beginning, with right of way over roadway twelve (12) feet wide along south side of said land; also a part of lots six (6) and seven (7), in block twenty (20), in said plat "A;" beginning seventy-seven (77) feet north of the southwest corner of said lot six (6), thence east eight (8) rods, thence south fifty-five (55) feet, thence east five (5) rods, thence north one hundred and forty-eight (148) feet and ten (10) inches, thence west one hundred and thirty-four (134) feet and six (6) inches, thence south five (5) feet and eight (8) inches, thence west eighty (80) feet, thence south eighty-eight (88) feet and two (2) inches to beginning; also a part of the southwest quarter of section four (4), in township five (5) north, of range one (1) west, of the Salt Lake meridian, U. S. survey, described as follows: Beginning at a point two (2) rods south of the northeast corner of said quarter, thence west eighty (80) rods, thence south fourteen and one-fourth (14¼) roads, thence east eighty (80) rods, thence north fourteen and one-fourth (14¼) rods to place of beginning; also beginning at a
200 point one hundred and ten (110) rods north from the southeast corner of said quarter section, thence west eighty (80) rods, thence north thirty (30) rods, thence east eighty (80) rods, thence south thirty rods to place of beginning, containing in all 22.12½ acres; also a part of the northeast quarter of section thirty (30), in township six (6) north, of range one (1) west, of the Salt Lake meridian, U. S. survey; beginning at a point one and $6\frac{1}{100}$

chains north and three $\frac{75}{100}$ chains west from the southeast corner of said quarter section, thence west ten and $\frac{25}{100}$ chains, thence north ten (10) chains, thence east ten and $\frac{25}{100}$ chains, thence south ten (10) chains to place of beginning, containing $10\frac{25}{100}$ acres.

(Endorsed:) "Pl'ff's Exhibit No. 3," A. H. W.

"EXHIBIT No. 4."

Know all men by these presents that I, Oscar E. Hill, of Ogden City, Utah, am held and firmly bound unto Mills H. Beardsley, of the same place, in the full sum of one thousand dollars, lawful money of the United States, which sum, well and truly to pay, I bind myself, my heirs, executors, administrators, and assigns, firmly by these presents. Sealed with my seal and dated this 10th day of January, 1885. The condition of this obligation is such that whereas the above-bounden Oscar E. Hill has sold and agreed to convey to the said Mills H. Beardsley the lands described in Schedule "A," hereto annexed (and which is made a part hereof), on or
201 before one year from this date for the sum of five hundred dollars:

Now, if the said Oscar E. Hill shall, on or before the 10th day of January, 1886, make, execute, and deliver to the said Mills H. Beardsley a good and sufficient warrantee deed of said lands, conveying to the said Mills H. Beardsley an unencumbered title in fee simple therein (provided the said Mills H. Beardsley shall on or before that day have paid to him, the said Oscar E. Hill, the sum of five hundred dollars above specified and interest), then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof I have hereunto set my hand and seal the day and year first above written.

OSCAR E. HILL. [SEAL.]

In presence of—
J. M. LANGSDORF.

"SCHEDULE A."

Description of Real Estate Referred to in Foregoing Bond.

The following-described lands and premises situated in the city of Akron, county of Summit, and State of Ohio, and known as a part of lot number two (2), tract number eight (8), and described as follows: Beginning in the west line of Brown street and sev-
202 enty-five (75) feet south of *of* the north line of Vine street extended, south sixty-six (66) feet; thence west three (3) chains and seventy-four (74) links; thence north sixty-six (66) feet; thence east three (3) chains and seventy-four (74) links, to beginning.

(Endorsed:) Pl'ff's "Exhibit No. 4," A. H. W.

"EXHIBIT No. 5."

Know all men by these presents that I, Jesse M. Langsdorf, of Ogden City, Utah, am held and firmly bound unto Mills H. Beardsley, of the same place, in the sum of sixteen thousand dollars, lawful money of the United States, which sum well and truly to pay I bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with my seal and dated this 10th day of January, 1885.

The condition of this obligation is such that whereas the above-bonded Jesse M. Langsdorf has sold and agreed to convey to the said Mills H. Beardsley, on or before one year from the date hereof, for the sum of eight thousand dollars, the lands described in Schedule "A," hereto annexed, and which is made a part hereof:

Now, therefore, if the said Jesse M. Langsdorf, on or before the 10th day of January, 1886, shall make, execute, and deliver to the said Mills H. Beardsley a warrantee deed, conveying an unencumbered estate in fee simple in and to said lands (provided the
203 said Mills H. Beardsley, on or before that day, shall have paid to the said Jesse M. Langsdorf the full sum of eight thousand (8,000) dollars and interest from date, as above specified), then this obligation shall be void; otherwise to remain in full force and virtue.

In witness whereof I have hereunto set my hand and seal this 10th day of January, 1885.

JESSE M. LANGSDORF. [SEAL.]

In presence of—
O. E. HILL.

"SCHEDULE A."

Description of Lands Referred to in Annexed Bond.

The west half of the northwest quarter of section eleven (11), in township seven (7) south, of range three (3) east, in the township of Madison, county of Lenawee, and State of Michigan, containing eighty acres of land, more or less—

Excepting and reserving that part of said lands lying within the following boundaries, to wit:

Beginning on the north line of said section at a point two (2) chains and (57½) links east of the northwest corner thereof, thence east on said section line to the northeast corner of the aforesaid west half of northwest quarter of section eleven, thence south five (5) chains and twenty-seven (27) links, thence west parallel with north line of said section seven (7) chains and seventy-
204 eight (78) links, thence north 3° west to a point four (4) chains and seventy-five (75) links south of north line of said section, thence south 87° 30′ west three (3) chains and ninety-six (96) links, thence north 2° 30′ west two (2) chains and thirty (30) links, thence south 87° 30′ west four (4) chains and fifty-seven (57)

links, thence south 2° 30′ east about fifty-five (55) links to a point three chains south of north line of said section, thence west one (1) chain and twenty-five and one-half (25½) links to a point two (2) chains and fifty-seven and one-half (57½) links east of west line of said section, thence north three (3) chains to beginning, containing sixty-nine (69) acres of land, more or less.

(Endorsed:) "Pl'ff's Exhibit No. 5," A. H. W.

"EXHIBIT B."

This indenture, made the 10th day of January, in the year of our Lord one thousand eight hundred and eighty-five, between Mills H. Beardsley, of Ogden City, county of Weber, and Territory of Utah, party of the first part, and James C. Armstrong, of the same place, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of six thousand five hundred dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey,
205 and confirm unto the *second* party of the second part and to his heirs and assigns forever the following-described lands, to wit: The west half of lot eight (8) and a part of lot nine (9), in block two (2), in plat "A" of Ogden City survey; beginning at the northeast corner of said lot nine (9), thence west four (4) rods, thence south five (5) rods, thence east four (4) rods, thence north five (5) rods to place of beginning; also a part of lot six (6), in block nine (9), in plat "A" of Ogden City survey; beginning at the southwest corner of said lot six (6), thence north forty-four (44) feet, thence east five (5) rods, thence south forty-four (44) feet, thence west five (5) rods to beginning; also a part of lot nine (9), in block thirteen (13), in plat "A" of Ogden City survey; beginning twelve (12) feet south of the northeast corner of said lot nine (9), thence south six (6) rods, thence west thirteen and one-half (13½) rods, thence north six (6) rods, thence east thirteen and one-half (13½) rods to beginning, with right of way over roadway twelve (12) feet wide along north side of said land; also a part of lot six (6) and seven (7), in block twenty (20), in plat "A" of Ogden City survey; beginning seventy-seven (77) feet north of the southwest corner of said lot six, thence east eight (8) rods, thence south fifty-five (55) feet, thence east five (5) rods, thence north one hundred forty-eight (148) feet and ten (10) inches, thence west one
206 hundred thirty-four feet (134) *feet* and six (6) inches, thence south five (5) feet and eight (8) inches, thence west eighty (80) feet, thence south eighty-eight (88) feet and two (2) inches to beginning, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said *property* of the

first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever; and the said party of the first part and his heirs, executors, and administrators the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said party of the first part and his heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

MILLS H. BEARDSLEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
ALFRED H. NELSON.

207 UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss.
County of Weber, }

On this 10th day of January, A. D. one thousand eight hundred and eighty-five, personally appeared before me, a notary public in and for said county, Mills H. Beardsley, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office, in Ogden City, the day and year in this certificate above written.

[SEAL.] ALFRED H. NELSON,
Notary Public.

(Endorsed:) Def'ts' Exhibit "B," A. H. W. Deed. Mills H. Beardsley to James C. Armstrong. Dated January 10th, 1885. Recorded at the request of Alfred H. Nelson, January 12th, A. D. 1885, at ten min. past nine a. m., in Book "R" of Deeds, pages 576 and 577. F. J. Cannon, recorder Weber county, by John Harner, deputy.

208 "EXHIBIT C."

This indenture, made 10th day of January, in the year of our Lord one thousand eight hundred and eighty-five, between Mills H. Beardsley, of Ogden City, county of Weber and Territory of Utah, party of the first part, and James C. Armstrong, of the same place, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of twenty-five hundred dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, and confirm unto the *second* party of the second part and to his heirs and assigns forever a part of the southwest quarter of section four (4), in township five (5) north, of range one (1) west, of the Salt Lake meridian, U. S. survey; beginning at a point two (2) rods south of the northeast corner of said quarter section, thence west eighty (80) rods, thence south fourteen and one-fourth (14¼) rods, thence east eighty (80) rods, thence north fourteen and one-fourth (14¼) rods to place of beginning; also beginning at a point one hundred and ten (110) rods north from the southeast corner of said quarter section, thence west eighty (80) rods, thence north thirty (30) rods, thence east eighty (80) rods, thence south thirty (30) rods to place of
209 beginning, containing in all 22.12½ acres; also a part of the northeast quarter of section thirty (30), in township six (6) north, of range one (1) west, of the Salt Lake meridian, U. S. survey; beginning at a point one and $\frac{42}{100}$ chains north and three and $\frac{10}{100}$ chains west of the southeast corner of said quarter section, thence west ten and $\frac{20}{100}$ chains, thence north ten (10) chains, thence east ten and $\frac{30}{100}$ chains, thence south ten (10) chains to place of beginning, containing $10\frac{45}{100}$ acres, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, titles, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever; and the said party of the first part and his heirs, executors, and administrators the said premises in the quiet and peaceable possession of the said party of the second part,
his heirs and assigns, against the said party of the first part
210 and his heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

MILLS H. BEARDSLEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
ALFRED H. NELSON.

UNITED STATES OF AMERICA.

TERRITORY OF UTAH, }
County of Weber, } *ss*:

On this 10th day of January, A. D. one thousand eight hundred

and eighty-five, personally appeared before me, a notary public in and for said county, Mills H. Beardsley, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office, in Ogden City, the day and year in this certificate above written.

[SEAL.] ALFRED H. NELSON,
Notary Public.

211 (Endorsed:) Defendants' "Exhibit C," A. H. W. Deed. Mills H. Beardsley to James C. Armstrong. Dated Jan. 10th, 1885. Recorded at the request of Alfred H. Nelson on January 12th, 1885, at ten min. past nine a. m., in Book "R" of Deeds, pages 575 and 576. F. J. Cannon, recorder Weber county, by John Harner, deputy.

"EXHIBIT D."

This indenture, made the 10th day of January, in the year of our Lord one thousand eight hundred and eighty-five, between Mills H. Beardsley, of Ogden City, county of Weber, and Territory of Utah, party of the first part, and Oscar E. Hill, of the same place, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do- by these presents grant, bargain, sell, convey, and confirm unto the *second* party of the second part and to his heirs and assigns forever the following-described lands and premises situated in the city of Akron, county of Summit, and State of Ohio, and known as a part of lot number two (2), tract number eight (8), and described as follows: Beginning in the west line of Brown street and seventy-five (75) feet south of the north line of Vine street extended, thence south
212 sixty-six (66) feet, thence west three chains and seventy-four (74) links, thence north sixty-six (66) feet, thence east three (3) chains and seventy-four (74) links to the beginning, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of said the party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever; and the

said party of the first part and his heirs, executors, and administrators the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said party of the first part and his heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

MILLS H. BEARDSLEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. M. LANGSDORF.
ALFRED H. NELSON.

213 UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Weber, }

On this 10th day of January, A. D. one thousand eight hundred and eighty-five, personally appeared before me, a notary public in and for said county, Mills H. Beardsley, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described and who executed the said annexed instrument as a party thereto, and duly acknowledged to me that *they* executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office, in Ogden City, the day and year in this certificate first above written.

[SEAL.] ALFRED H. NELSON,
Notary Public.

TERRITORY OF UTAH, } ss:
County of Weber, }

I, A. C. Emerson, clerk of the 1st district court of the Territory of Utah, do hereby certify that Alfred H. Nelson, whose name is subscribed to the annexed instrument, was at the date of same and now is a notary public in and for said Weber county, duly com-
214 missioned and qualified and authorized by law to take acknowledgements of instruments, and full faith and credit are due to all his official acts as such; and I do further certify that the signature attached to the annexed — is his proper signature and is genuine. I do further certify that the said instrument is executed and acknowledged according to the laws of the Territory of Utah.

Witness my hand and the seal of said court, at my office, in Ogden City, this 15th day of January, A. D. 1885.

[Seal 1st Dist. C't.]

A. C. EMERSON, *Clerk.*

(Endorsed:) Def'ts' Exhibit "D," A. H. W. Entered for transfer

Jan'y 22nd. Geo. W. Weeks, Jr., dep. auditor. Deed. Mills H. Beardsley to Oscar E. Hill. Dated Jan. 10th, 1885. Recorded at the request of —— ——, Jan. 22nd, 1885, at — min. past — m., in 145 of Deeds, page 573. H. C. Searles, recorder —— county.

"EXHIBIT E."

This indenture, made the 10th day of January, in the year of our Lord one thousand eight hundred and eighty-five, between Mills H. Beardsley, of Ogden City, county of Weber and Territory of Utah, party of the first part, and Jesse M. Langsdorf, of the same
215 place, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of ten thousand dollars, lawful money of the United States of America, to *them* in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey and confirm unto the said party of the second part and to his heirs and assigns forever the west half of the northwest quarter of section eleven (11), in township seven (7) south, of range three (3) east, in the township of Madison, county of Lenawee, and State of Michigan, containing eighty acres, more or less, excepting and reserving that part of said lands lying within the following boundaries, to wit:

Beginning at the north line of said section at a point two chains and fifty-seven and one-half (57½) links east of the northwest corner thereof, thence east on said section line to the northeast corner of the aforesaid west half of northwest quarter of section eleven, thence south five (5) chains and twenty-seven (7) links, thence west parallel with north line of said section seven (7) chains and seventy-eight (78) links, thence north 3° west to a point four (4) chains and seventy-five (75) links south of the north line of said section, thence south 87° 30′ west three (3) chains and ninety-six (96) links, thence
216 N. 2° 30′ west two (2) chains and thirty (30) links, thence south 87° 30′ west four (4) chains and fifty-seven (57) links, thence south 2° 30′ east about fifty-five (55) links to a point three (3) chains south of north line of said section, thence west one (1) chain and twenty-five and one-half (25½) links to a point two chains and fifty-seven and one-half (57½) links east of the west line of said section, thence north three (3) chains to beginning, containing sixty-nine (69) acres of land, more or less, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever; and the said party of the first part and *their* heirs, executors, and administrators the said premises in the quiet and peaceable possession of the said party

of the second part, his heirs and assigns, against the said party of the first part and *their* heirs and against all and every per-
217 son and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the said party of the first part have hereunto set *their* hands and seal the day and year first above written.

MILLS H. BEARDSLEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
O. E. HILL,
ALFRED H. NELSON.

UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Weber, }

On this 10th day of January, A. D. one thousand eight hundred and eighty-five, personally appeared before me, a notary public in and for said county, Mills H. Beardsley, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as party thereto, and who acknowledged to me that *they* executed the same freely and voluntarily and for the uses and purposes therein mentioned, and that the same is his free act and deed.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office, in Ogden City, the day and year in this certificate first above written.

[SEAL.] ALFRED H. NELSON,
Notary Public.

218 TERRITORY OF UTAH, } ss:
County of Weber, }

I, A. C. Emerson, clerk of the 1st district court of the Territory of Utah, do hereby certify that Alfred H. Nelson, whose name is subscribed to the annexed instrument, was at the date of the same and now is a notary public in and for said Weber county, duly commissioned and qualified and authorized by law to take acknowledgements of instruments, and full faith and credit are due to all his official acts as such, and I do further certify that the signature attached to the annexed is his proper signature and is genuine. I do further certify that the said instrument is executed and acknowledged according to the laws of the Territory of Utah.

Witness my hand and the seal of said court, at my office, in Ogden City, this 15th day of January, A. D. 1885.

[Seal of 1st Dist. C't, Utah.]

A. C. EMERSON, *Clerk.*

(Endorsed:) Def'ts' Exhibit "E," A. H. W. Deed. Mills H.

Beardsley to Jessie M. Langsdorf. Dated Jan. 10th, 1885. State of Michigan, Lenawee Co., register's office. Received for record January 20th, A. D. 1885, at 9¾ o'clock a. m., and recorded in Liber 141 of Deeds, pages 79, 80, and 81. Avery A. Dolbear, deputy register.

219 "EXHIBIT L."

TERRITORY OF UTAH, } ss:
County of Weber, }

In the District Court of the 1st Judicial District.

THE UTAH NATIONAL BANK OF OGDEN, a Corporation Organized and Existing under the Laws of the United States, Pl'ff,
vs.
MILLS H. BEARDSLEY, Defendant. } Complaint.

The plaintiff above named complains of the defendant above named and alleges—

That the said plaintiff is now and was at all the times hereinafter alleged a corporation organized and existing under the laws of the United States and doing a banking business at Ogden City, Territory of Utah; that heretofore, to wit, on December 29th, 1884, at Ogden, Utah, the said defendant made and executed his certain promissory note in the words and figures following, to wit:

$4,000. OGDEN, UTAH, *Dec.* 29, 1884.

220 On the 29th day of January, 1885, for value received, I promise to pay the Utah National Bank of Ogden, or order, four thousand dollars, payable in U. S. gold coin, at the Utah National Bank of Ogden, with interest, at the rate of two per cent. per month, from maturity until paid, both before and after judgment; and if not paid at maturity, two per cent. additional for costs of collection.

M. H. BEARDSLEY.

and then and there delivered the same to said plaintiff; that the said plaintiff is now the owner and holder of said promissory note; that the same is wholly due and no part thereof has been paid except the sum of twelve hundred dollars.

Wherefore the plaintiff demands judgment against said defendant for the sum of three thousand and eighty (3,080.00) dollars, together with interest on twenty-eight hundred dollars thereof, at the rate of two per cent. per month, from the 29th day of January, 1885, and for costs of suit, and that said judgment *to* be made to bear interest at the rate of two per cent. per month until paid.

KIMBALL & HEYWOOD,
Att'ys for Pl'ff.

221 TERRITORY OF UTAH, } ss:
County of Weber, }

Richard M. Dooly, being duly sworn, says as follows: I am an officer of The Utah National Bank of Ogden, the plaintiff above named, to wit, the cashier thereof. I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge.

RICHARD M. DOOLY.

Subscribed and sworn to Feb-uary 17th, 1885, before me—
A. C. EMERSON,
Clerk 1st District Court,
By T. A. PERKINS, *Deputy.*

(Endorsed:) No. 601. In the district court, 1st judicial district. The Utah National Bank of Ogden *vs.* Mills H. Beardsley. Complaint. Filed Feb-uary 17th, 1885. A. C. Emerson, clerk, by T. A. Perkins, deputy. Kimball & Heywood, att'y- for pl'ff.

"EXHIBIT G."

In the District Court of the First Judicial District of the Territory of Utah, Weber County.

222 THE UTAH NATIONAL BANK OF OGDEN, a Corporation Organized and Existing under the Laws of the United States, Plaintiff,
vs.
MILLS H. BEARDSLEY, Defendant. } Summons.

The people of the Territory of Utah send greeting to Mills H. Beardsley, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served out of this county but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint. The said action is brought to recover the sum of $3,080.00, alleged to be due and owing plaintiff from you upon a certain promissory note made and delivered to plaintiff by you on Dec. 29th,
223 1884, together with interest, at two per cent. per month, on said sum from Jan. 29th, 1885, until paid, and for costs of suit herein. For fuller particulars reference is hereby made to said complaint, on file herein; and you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for the sum of $3,080.00, interest as aforesaid, and costs.

Witness the Hon. Philip H. Emerson, judge, and the seal of the district court of the first judicial district in and for the Territory of Utah, this 24th day of Feb-uary, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] A. C. EMERSON, *Clerk*,
By T. A. PERKINS,
Deputy Clerk.

TERRITORY OF UTAH, } ss:
County of Weber, }

I hereby certify and return that I have served the within summons by delivering a true copy thereof, attached to a certified copy of the complaint in this action, to the within-named defendant, M. H. Beardsley, personally, in Ogden City, Weber county, Utah
224 Territory, on the 24th day of Feb-uary, A. D. 1885.

E. A. IRELAND,
U. S. Marshal,
By T. A. PERKINS, *Deputy*.

Dated Feb-uary 25th, A. D. 1885.

Fees, $2.50.

(Endorsed:) No. 601. Original. District court, first judicial district, county of Weber. The Utah National Bank of Ogden, plaintiff, *vs.* M. H. Beardsley, defendant. Summons. Kimball & Heywood, plaintiff's attorneys. Filed on return Feb. 25th, 1885. A. C. Emerson, clerk, by T. A. Perkins, deputy clerk.

"EXHIBIT H."

District Court for the First Judicial District, Territory of Utah.

THE UTAH NATIONAL BANK OF OGDEN, Plaintiff, }
vs. } Default.
MILLS H. BEARDSLEY, Defendant. }

In this action the defendant, Mills H. Beardsley, having been regularly served with process and having failed to appear
225 and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of the said defendant, Mills H. Beardsley, in the premises, hereby duly entered according to law.

Attest my hand and the seal of said court this 18th day of March, 1885.

[SEAL.] A. C. EMERSON, *Clerk*.

(Endorsed:) No. 601. District court, first judicial district, Territory of Utah. The Utah National Bank of Ogden, plaintiff, *vs.* M. H. Beardsley, defendant. Default. Filed March 18th, 1885. A. C. Emerson, clerk.

"EXHIBIT I."

In the District Court of the First Judicial District of the Territory of Utah, County of Weber.

THE UTAH NATIONAL BANK OF OGDEN, Plaintiff,
vs.
MILLS H. BEARDSLEY, Defendant.
} Judgment by Default.

In this action the defendant, Mills H. Beardsley, having been regularly served with process, and having failed to appear
226 and answer the plaintiff's complaint filed herein, the legal time for answering having expired and no answer or demurrer having — filed, the default of the said defendant, Mills H. Beardsley, in the premises having been duly entered according to law, upon application of said plaintiff's counsel, judgment is hereby entered ageinst said defendant in pursuance of the prayer of said complaint. Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that the said plaintiff do have and recover from the said defendant the sum of three thousand and eighty dollars, with interest on twenty-eight hundred dollars thereof, at the rate of two (2) per cent. per month, from the 29th day of January, A. D. 1885, and that the whole of the amount due the plaintiff draw and bear interest at the rate of two (2) per cent. per month until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of twenty-six $\frac{75}{100}$ dollars.

Judgment rendered March 18th, A. D. 1885.

227 (Endorsed:) No. 601. In first district court, Utah Ter. The Utah National Bank of Ogden, plaintiffs, *vs.* Mills H. Beardsley, defendant. Judgment by default. Filed and recorded March 18th, 1885. A. C. Emerson, clerk.

Book "A," folio 191.

"EXHIBIT I."

TERRITORY OF UTAH,
Weber County.
}

District Court, First Judicial District.

Hon. Orlando W. Powers, judge.

THE UTAH NATIONAL BANK OF OGDEN, Plaintiff,
vs.
MILLS H. BEARDSLEY, Defendant.
} Execution.

The People of the Territory of Utah to the United States marshal for Utah Territory, Greeting:

Whereas on the 18th day of March, A. D. 1885, The Utah National Bank of Ogden, as plaintiff, recovered a judgment in the said dis-

trict court of the first judicial district of the Territory of Utah against Mills H. Beardsley, defendant, for the sum of thirty-one hundred sixty-six and $\frac{65}{100}$ dollars, with interest thereon from
228 March 18th, 1885, at the rate of two per cent. per month till paid, together with twenty-six $\frac{75}{100}$ dollars, costs and disbursements at the date of said judgment, and accruing costs, as appear to be of record;

And whereas the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court in the county of Weber, and the said judgment was docketed in the said clerk's office in the said county on the day and year first above written, and the sum of thirty-one hundred sixty-six $\frac{65}{100}$ dollars, with interest thereon, as above set out, and costs of suit, taxed thereon at twenty-six $\frac{75}{100}$ dollars, is now (at the date of this writ) actually due on said judgment:

Now you, the said United States marshal, are hereby required to make the said sum due on said judgment, with interest as aforesaid, and cost- and accruing costs, to satisfy the said judgment, in lawful money of the United States, and of the personal property of the said debtor; or, if sufficient personal property of said debtor cannot be found, then out of the real property in your jurisdiction
229 belonging to him on the day whereon said judgment was docketed in said court or any time thereafter, and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed hereon.

Witness Hon. Orlando W. Powers, judge, and the seal of said district court this 12th day of August, 1885.

[SEAL] A. C. EMERSON, *Clerk.*

TERRITORY OF UTAH, } ss:
County of Weber, }

I, E. A. Ireland, United States marshal for the Territory of Utah, do hereby certify and return that I received the attached writ of execution on the 13th day of August, A. D. 1885, and that under and by virtue of said writ and by instructions of plaintiff's attorneys, I did on said day levy on, by taking into my possession, certain personal property then in building known as the Broom Hotel, corner Main and Fifth streets, Ogden City, Utah, as the property of Mills H. Beardsley, defendant, and judgment debtor in said writ named, in whose possession said property then was. An inventory of said property so levied upon is hereto attached, marked Exhibit "A," hereby referred to, and made part hereof.

230 I further certify and return that after said levy said M. H. Beardsley claimed from said described property so levied upon certain articles exempt from execution, and the same were thereupon released from said levy and delivered to said M. H. Beardsley. A list of said exempted property is hereto attached, marked Exhibit "B," referred to, and made part hereof.

I further certify and return that upon the 21st day of August, A. D. 1885, and after having advertised the same according to law, I commenced the sale of said property and sold at public auction, in

the manner provided by statute, to the best and highest bidders, that portion of said property so levied upon contained in rooms 40, 41, & 42 of said Broom Hotel building, more fully described in said Exhibit "A," attached hereto, which is hereby referred to.

That the sale of said portion of said property amounted to the sum of $142.55; that upon the 22nd day of August, A. D. 1885, continuing said sale, I sold at public auction, in the manner provided by statute, all the personal property so levied upon as aforesaid (except the property exempted as aforesaid), in one lot, to John Broom for the sum of $3,856.45, he being the highest bidder and that being the highest sum bid for the same. I further cer-
231 tify and return that I delivered to said John Broom a certificate of sale of said property; that the total of all the sums bid and by me received upon the sale of said property amounted to the sum of $3,999.30; that I paid of the same to John Broom, for rent of hotel during the time between levy and sale, the sum of $80.00, as appears by his receipt therefor, attached hereto, marked Exhibit "C."

To clerk of court accrued costs, $2.50, as appears by his receipt therefor, attached hereto, marked Exhibit "D."

To plaintiff's attorneys in full of judg't, costs, and int., as appears by their receipt therefor, endorsed on said writ and marked Exhibit "E," $3,516.41.

That I retain as my fees and disbursements 131.40; amounting in all to the sum of $3,730.31.

That I paid to M. H. Beardsley, defendant, the balance, 269.00.

Wherefore I return the execution fully satisfied.

E. A. IRELAND,
U. S. Marshal,
By T. A. PERKINS, *Deputy.*

Dated Sept. 28th, 1885. Fees, $131.40.

INVENTORY EXHIBIT "A."

Office: 1 perforated wood-seat settee, 11 red cane-seat arm chairs, 1 writing desk with mirrors, clock, and advertising frame; 1 Hall's patent iron safe, 7 spittoons, 1 office clock, 1 large stove with zinc and pipe, 1 large map of Utah, 1 large map of the world, 1
232 chandelier with two lamps, 1 mat, 1 stool, 1 case pigeon-holes, 1 cane-seat chair, 1 baggage truck, 1 silver-plated card receiver, 1 call bell.

Wash-room: 1 mirror, 1 bracket lamp with reflector, 2 towels with rollers, 2 maps of United States, 1 brush & comb, 3 soap dishes, 1 pitcher.

Gent's room: 2 step-ladders, 2 coal scuttles, 2 sprinkling pots, 4 brooms, 1 mop, 1 piece of hose, 3 pails, 2 tubs, 13 pitchers.

Dining-room: 8 tables, 5 side tables, 65 chairs, 1 mirror, 2 sideboards, 2 chandeliers, with 4 lamps each; 7 fly fans, 1 stove, with 12 joints Russian pipe; 8 castors, 17 china salts, 13 glass salts, 4 water

pitchers, 56 goblets, 8 pickle castors, 8 silver-plated sugar bowls, 17 finger bowls, 5 fruit knives, 7 butter knives, 92 silver-plated teaspoons, 65 silver-plated knives, 51 silver-plated tablespoons, 75 silver-plated forks, 2 fancy water pitchers, 13 silver-plated knives, 13 silver-plated forks, 8 silver-plated tablespoons, 5 silver-plated teaspoons, 9 egg goblets, 4 spoon-holders, 1 linen basket, 8 silver-plated cream pitchers, 8 silver-plated butter dishes, 8 silver-plated cake stands, 8 silver-plated syrup pitchers, 7 toothpick-holders, 4 mustard-holders, 87 butter tips.

233 Kitchen, pantry, and dish-room: 8 jelly molds, 1 three-gal-stone jar, 1 zinc pail, 4 cooking buckets, 7 sauce pans, 5 spiders, 8 milk pans, 2 coal scuttles, 9 meat pans, 7 water buckets, 4 bushel baskets, 5 round pans, 6 square pans, 10 muffin irons, 80 pie plates, 11 square tins, 6 dish pans, 1 copper coffee boiler, 1 brass kettle, 1 stove, 2 kitchen tables, 1 high chair, 6 kitchen chairs, 5 lengths stove-pipe, 1 ice-cream freezer, 1 pair scales, 1 granite pail, 1 tin wash-boiler, 1 q't and 1 p't granite measure, 9 water pitchers, 6 mustard bowls, 1 cream pitcher, 1 coal scuttle, 1 dust pan, 1 broom, 11 trays, 88 large platters, 19 bowls, 38 saucers, 104 cups, 135 side dishes, 127 small platters, 6 silver-plated teapots, 73 pie plates, 2 large bowls, 7 kitchen forks, 6 kitchen knives, 4 kitchen spoons, 55 sauce dishes, 8 glass celery dishes, 9 glass fruit dishes, 28 butter tips, 11 egg cups, 4 small coffee cups, 69 cream pitchers, 2 china fruit dishes, 1 salad bowl, 8 glass cake stands, 99 platters, 29 side dishes, 1 Monitor range No. 19, 1 steamer, 1 boiler, 11 joint- range pipe, 1 Mississippi range No. 26, 1 steam tank, 17 basting spoons, 2 skimmers, 6 ladles, 3 cullenders, 6 forks, 2 strainers, 2 egg dishes, 9 frying pans, 2 dripping pans, 1 potato spoon, 1 stock boiler, 1 sieve, 1 sausage machine, 1 cleaver, 3 sauce pans, 1 scraper.

Room 18: 1 David O. Calder square piano, with cover and
234 stool; 3 upholstered easy chairs, 1 camp chair, 1 settee, 1 stove, with zinc and 5 joints of pipe; 1 Brussels carpet, 2 sets lace curtains, 2 sets fancy curtains, with hangings; 3 chair tidies, 1 mirror, 1 spittoon, 1 chandelier, with 3 lamps.

Hall, 2nd floor: 1 hat rack, 3 mats, 3 nickel spittoons, 1 Brussels carpet, 2 chandeliers, with 3 lamps each; 1 hanging lamp, 1 rack, Brussels carpet on front stairs, rubber mat at foot.

Room 11: 1 panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows and pillow slips; 1 marble-top washstand, with bowl and pitcher; slop jar, chamber, soap dish, tumbler, and 2 towels, 1 marble-top dressing-case, 1 upholstered easy chair, 1 marble-top table, with cover; 1 camp chair, 1 cane-seat black-walnut chair, 1 cane-seat rocking chair, 1 spittoon, 1 rack, 1 hanging lamp, Brussels carpet, 2 lace curtains, with hangings.

Rooms 12 and 13: 1 ash-panel bedstead, with springs, mattress, wool mattress; 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 ash dressing case, 1 ash washstand, with wash bowl and pitcher; slop jar, chamber, soap dish, tumbler, and 2 towels, 1
235 center table, with cover; 1 sofa, 1 large easy chair, 1 camp chair, 2 black-walnut cane-seat chairs, 1 stove, with zinc

elbow and five joints pipe; 1 spittoon, 1 hat rack, 2 tidies, 1 hanging lamp, 2 Brussels carpets, 1 match safe, 1 curtain.

Room 9: 1 cherry-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 cherry marble-top dressing case, 1 cherry marble-top washstand, with wash bowl and pitcher; 1 small water pitcher, 1 mug, 1 vase, 1 soap dish, 1 chamber, 1 towel rack, and two towels, 1 hat rack, 1 Brussels carpet, 1 spittoon, 1 hanging lamp, 2 lace curtains with hangings, 1 large easy chair, 1 willow rocking chair, 1 black-walnut cane-seat chair, 1 match safe, 5 tidies.

Room 7: 1 walnut-panel bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow slips; 1 washstand, with wash bowl and pitcher; chamber, soap dish, tumbler, and 4 towels, 1 mirror, 1 spittoon, 1 hat rack, 1 camp chair, 1 ingrain carpet, 1 curtain.

Room 5: 1 black-walnut panel bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow slips; 1 washstand, with wash bowl and pitcher; 1 slop jar, soap dish, 1 chamber, 2 towels, 1 looking glass, 1 sofa, 1 small stand,
236 1 wooden chair, 1 camp chair, 1 ingrain carpet, 1 spittoon, 1 tidy.

Room 10, parlor: 1 upholstered rocking chair, 2 upholstered easy chairs, 1 upholstered chair, 1 upholstered corner chair, 1 upholstered settee, 1 pier glass, 1 chandelier, with 2 lamps; 1 Brussels carpet, 1 center table, 4 raw-silk curtains, 2 lambrequins and poles, 4 lace curtains, 1 tidy.

Rooms 14 and 15: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 washstand, with wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 tumbler, and 1 towel, 1 hat rack, 1 curtain, 2 black-walnut cane-seat chairs, 1 willow rocking chair, 1 upholstered easy chair, 1 sofa, 2 woolen curtains, 2 lace curtains and fixtures, 1 ash dressing case, 1 match safe, 1 center table and cover, 2 tidies, 1 spittoon, 2 Brussels carpets, 1 hanging lamp.

Rooms 16 and 17: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair of blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 curtain, 1 washstand, with wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 chamber, 1 tumbler, and 3 towels, 2 black-walnut cane-seat chairs, 1 black-walnut cane-seat rocking chair, 1 sofa, 1 upholstered easy chair, 1 stove, with zinc, 4 joints pipe, and 1 elbow;
237 1 lambrequin and pole, 1 hanging lamp, 1 center table and cover, 1 spittoon, 2 Brussels carpets, 1 match safe, 1 hat rack.

Room 27: 1 black-walnut bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow slips; 1 washstand, with wash bowl and pitcher; 1 looking glass, 1 soap dish, 1 hand lamp, 1 wooden chair, 1 ingrain carpet.

Rooms 21 and 22: 1 black-walnut panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 2 pillows and 2 plilow slips, 1 bed spread; 1 marble-top washstand, with wash bowl and pitcher; 2 pitchers, 1 slop jar, 1 mug, 4 towels, 1 vase, 1 soap dish, 1 tumbler, 1 hand lamp, 1 chamber, 1 curtain, 1 hat rack, 2 black-

walnut cane-seat chairs, 1 marble-top dressing case, 1 center table and cover, 1 sofa, 1 willow rocking-chair, 1 black-walnut cane-seat rocking-chair, 1 upholstered rocking chair, 1 upholstered easy-chair, 3 tidies, 1 spittoon, 1 stove, with zinc; 4 lengths of pipe and 1 elbow, 2 Brussels carpets, 1 match safe.

Rooms 19 and 20: 1 cherry-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, bed spread, 2 pillows, and 2 pillow slips; 1 marble-top dressing case, 1 marble-top washstand, with wash bowl and pitcher; 1 slop jar, 1 vase, 1 mug, 1 soap dish, 1 tumbler, 1 chamber and 3 towels, 1 spittoon, 1 hat rack, 1
238 curtain, 1 mat, 5 lace curtains and fixtures, 2 lambrequins and poles, 1 black-walnut cane-seat chair, 1 camp chair, 1 willow rocking chair, 1 upholstered easy chair, 1 hanging lamp, 1 stove, with zinc, 5 joints pipe, and 1 elbow; 2 Brussels carpets, 1 center table and cover.

Rooms 25 and 26: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 pair colored blankets, 1 washstand, with wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 chamber, 1 goblet, 1 tumbler, 1 hanging lamp, 2 flat-irons, 1 hat rack, 2 black-walnut cane-seat chairs, 1 towel, 1 dressing case, 1 center table and cover, 1 sofa, 1 upholstered easy chair, 1 camp chair, 1 black-walnut cane-seat rocking chair, 1 spittoon, 1 stove, with zinc; 4 joints pipe and 1 elbow; 2 tidies, 1 match safe, 2 Brussels carpets.

Rooms 23 and 24: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bedspread, 2 pillows, and 2 pillow slips; 1 curtain, 1 hat rack, 1 ash washstand, with wash bowl and pitcher; slop jar, chamber, soap dish, 3 towels, 1 hand lamp, 1 hanging lamp, 1 dressing case, 1 center table and cover, 1 sofa, 2 black-walnut cane-seat chairs, 1 black-walnut cane-seat rocking-chair, 1 stove, with zinc, 4 joints pipe, 1 elbow; 1 spittoon, 1 Brussels carpet, 1 ingrain carpet.

239 Rooms 59 & 60: 1 black-walnut bedstead, spring mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 black-walnut marble-top washstand, with wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 tumbler, 1 chamber, and 2 towels, 1 hat rack, 1 curtain, 2 black-walnut cane-seat chairs, 1 camp chair, 1 upholstered rocking chair, 1 upholstered easy chair, 1 black-walnut marble-top dressing case, 1 sofa, 2 cherry center tables, 1 table cover, 3 napkins, 1 spittoon, 1 mat, 2 Brussels carpets, 2 lace curtains and fixtures, 1 lambrequin and pole, 1 hanging lamp, 1 match safe, 1 tidy.

Room 58: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 tumbler, 1 chamber, 3 towels, 1 spittoon, 1 ash dressing case, 1 hat rack, 1 center table, with cover; 1 black-walnut cane-seat chair, 1 Brussels carpet, 1 black-walnut cane-seat rocking chair, 1 hanging lamp.

Room 57: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow

slips; 1 ash washstand, with wash bowl and pitcher; 1 soap dish, 1 tumbler, 1 slop jar, 1 chamber, 3 towels, 1 ash dressing case, 1 hat rack, 2 black-walnut cane-seat chairs, 1 Brussels carpet, 1 curtain.

240 Room 61: 1 black-walnut bedstead, with springs, mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and pillow slips; 1 black-walnut washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 tumbler, and 1 soap dish, 2 towels, 1 looking glass, 1 curtain, 1 hat rack, 1 sofa, 1 napkin, 1 ingrain carpet.

Room 62: 1 black-walnut bedstead, with springs, mattress, 2 sheets, 1 pair blankets, 1 bed-spread, 2 pillows, and 2 pillow slips; 1 black-walnut washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, 1 looking glass, 1 stand, 1 hat rack, 1 curtain, 1 black-walnut cane-seat chair, 1 camp chair, 1 hand, lamp, 1 ingrain carpet, 2 towels.

Room 56: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, & 3 towels, 1 ash dressing case, 1 spittoon, 1 hanging lamp, 1 sofa, 1 black-walnut cane-seat chair, 1 black-walnut cane-seat rocking chair, 1 camp chair, 1 center table & cover, 1 match safe, 1 Brussels carpet.

Room 55: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 chamber, 1 soap dish, 1 tumber, 1 slop jar, 1 ash dressing case, 4 towels, 2 black-walnut cane-seat chairs, 1 black-walnut cane-seat rocking chair, 1 ash center table, 1 spittoon, 1 hanging lamp, 1 hat rack, 1 Brussels carpet.

241 Room 53: 1 ash-panel bedstead, with springs, mattrass wool mattrass, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, 2 pillow slips; 1 ash washstand, with wash bowl and pitcher, 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, 1 ash dressing case, 3 towels, 1 upholstered easy chair, 1 black-walnut cane-seat chair, 1 black-walnut cane-seat rocking chair, 1 stove, with zinc, 5 joints of pipe, and 1 elbow; 2 lace curtains and fixtures; 1 center table and cover, 1 ingrain carpet, 1 hanging lamp, 1 hat rack.

Rooms 51 and 52: 1 ash-panel bedstead, with springs, mattrass, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, 1 ash dressing case, 3 towels, 1 hat rack, 2 black-walnut cane-seat chairs, 1 willow rocking chair, 1 upholstered easy chair, 1 center table and cover, 1 spittoon, 1 hanging lamp, 1 stove, with zinc, 5 joints pipe, & 1 elbow; 1 sofa, 2 Brussels carpets, 1 mat, 1 curtain, 2 napkins.

Room 48: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, and 2 pillow slips; 1 ash washstand, with wash bowl and pitcher; 1 chamber, 1 slop jar and soap dish, 4 towels, 1 tumbler, 1 ash dressing case,

241½ 1 sofa, 1 black-walnut cane-seat rocking chair, 1 camp chair, 1 black-walnut center table, 1 hanging lamp, 1 spittoon, 1

Brussels carpet, 1 stove, with zinc, 4 joints pipe, and 1 elbow; 1 napkin, 1 match safe.

Room 47: 1 black-walnut bedstead, with springs, mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 black-walnut washstand, with wash bowl and pitcher; 1 chamber, 1 soap dish, 2 towels, 1 looking-glass, 1 black-walnut cane-seat chair, 1 hat rack, 1 curtain, 1 ingrain carpet.

Room 49: 1 ash panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bedspread, 2 pillows, and 2 pillow slips; 1 ash dressing case, 1 ash washstand, with wash bowl and pitcher; 1 soap dish, 1 tumbler, 1 chamber, 1 slop jar, and 4 towels, 1 hand lamp, 1 hat rack, 1 black-walnut cane-seat chair, 1 black-walnut cane-seat rocking chair, 1 black-walnut center table, 1 spittoon, 1 ingrain carpet.

Room 50: 1 black-walnut bedstead, with springs, mattress, 2 sheets, 1 comforter, 1 bedspread, 2 pillows, and 2 pillow slips; 1 black-walnut washstand, with wash bowl and pitcher; 1 chamber, 1 soap dish, 1 looking glass, 1 hat rack, 1 black-walnut cane-seat chair, 1 ingrain carpet, 1 curtain.

Room 45: 1 black-walnut bedstead, with springs, mattrass, 2
242 sheets, 1 comforter, 1 bedspread, 2 pillows, and 2 pillow slips; 1 washstand, with wash bowl and pitcher; 1 chamber; 1 soap dish, 1 looking glass, 1 curtain, 1 camp chair, 1 cotton carpet, 1 hat rack.

Room 46: 1 black-walnut bedstead, 1 single black-walnut bedstead, 2 sets springs, 2 mattresses, 4 sheets, 2 comforters, 4 pillows, 3 pillow slips, 1 washstand, wash bowl and pitcher, chamber, 1 hand lamp, 1 looking glass, 1 soap dish, 1 curtain, 2 wooden chairs.

Room 43: 1 spittoon, two wooden chairs, 1 stove, with zinc, 4 joints pipe, and 1 elbow; 27 wooden horses, 1 lot boards, 1 coal scuttle.

Room 44: 1 black-walnut panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bedspread, 2 pillows and 2 pillow slips; 1 black-walnut marble-top dressing case, 1 black-walnut marble-top washstand, with wash bowl and pitcher; 1 chamber, 1 slop jar, 1 vase, 1 mug, 1 tumbler, 1 soap dish, & 2 towels, 1 stove, with zinc, 4 joints pipe, and elbow; 1 black-walnut center table and cover, 1 black-walnut cane-seat chair, 1 camp chair, 1 sofa, 1 hanging lamp, 1 spittoon, 1 willow rocking chair, 1 Brussels carpet, 1 match safe, 1 hat rack.

Rooms 41 & 42: 1 ash-panel bedstead, with springs, mattrass, wool mattress, 2 sheets, 1 pair blankets, 1 bedspread, 2 pillows
and 2 pillow slips, 1 ash dressing case, 1 black-walnut ward-
243 robe, 1 ash washstand, with wash bowl and pitcher, 1 slop jar, 1 chamber, 1 soap dish, 2 tumblers, 1 hand lamp, 1 hat rack, 1 black-walnut cane-seat chair, 2 upholstered easy chairs, 2 cherry center tables, 1 willow rocking chair, 1 sofa, 3 lace curtains, 3 lambrequins and poles, 2 Brussels carpets, 2 spittoons, 1 hanging lamp.

Room 40: 1 ash-panel bedstead, with springs, mattrass, wool mattrass, 2 sheets, 1 comforter, 1 bedspread, 2 pillows, & 2 pillow slips;

1 ash dressing case, 1 ash washstand, with wash bowl and pitcher, 1 slop jar, 1 chamber, 1 soap dish, 1 tumbler, 4 towels, 1 sofa, 2 black-walnut cane-seat chairs, 1 camp chair, 1 black-walnut center table, 1 hat rack, 1 hanging lamp, 1 ingrain carpet, 1 tidy.

Room 39: 1 black-walnut panel bedstead, with springs, mattress, 1 comforter, 2 sheets, 1 bedspread, 2 pillows, and 2 pillow slips; 1 black walnut washstand, with wash bowl and pitcher; 1 chamber, 1 soap dish, 2 towels, and 2 black-walnut cane-seat chairs, 1 hat rack, 1 looking glass, 1 ingrain carpet, 1 curtain.

Room 38: 2 pine bedsteads, 2 sets springs, 2 mattresses, 6 comforters, 4 sheets, 4 pillows, 4 pillow slips, 2 bedspreads, 2 washstands, 1 wash bowl and pitcher, 1 soap dish, 1 tumbler, 1 chamber,
244 1 hand lamp, 2 wooden chairs, 1 clock, 1 piece carpet, 1 towel.

Room 35: 2 pine bedsteads, 2 sets springs, 2 mattresses, 4 sheets, 6 comforters, 4 pillows, 3 pillow slips, 2 bed spreads, 1 washstand, 1 wash bowl and pitcher, 1 soap dish, 1 water pitcher, 1 looking glass, 1 hand lamp, 2 wooden chairs, 1 piece carpet, 3 towels.

Room 36: 1 black-walnut bedstead, with springs, mattress, wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 black-walnut washstand, with wash bowl and pitcher; 1 soap dish, 1 tumbler, 1 slop jar, 1 chamber, 1 looking glass, 3 black-walnut cane-seat chairs, 2 towels, 1 center table, 1 hand lamp, 1 curtain, 1 stove, with zinc, 4 joints pipe and elbow; 1 hat rack, 1 ingrain carpet.

Room 37: 1 black-walnut panel bedstead, with springs, mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 black-walnut washstand, with wash bowl and pitcher; 1 soap dish, 1 slop jar, 3 towels, 1 sofa, 1 black-walnut center table, 1 hand lamp, 1 spittoon, 1 curtain, 1 looking glass, 1 hat rack, 2 black-walnut cane-seat chairs, 1 tidy, 1 ingrain carpet.

Room 30: 1 ash panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bedstead, 2 pillows, and 2 pillow slips; 1 ash dressing case, 1 washstand, with was- bowl and
245 pitcher; 1 soap dish, 1 slop jar, 1 chamber, 1 tumbler, 4 towels, 1 black-walnut center table, 2 black-walnut cane-seat chairs, 1 willow rocking chair, 1 spittoon, 1 hanging lamp, 1 stove, with 2 joints pipe and 1 elbow; 1 piece oilcloth, 2 lambrequins and poles, 1 Brussels carpet.

Room 31: 1 ash-panel bedstead, with springs, mattress, wool mattress, 2 sheets, 1 comforter, 1 bed spread, 2 pillows, 2 pillow slips, 1 ash washstand, with wash bowl and pitcher; 1 soap dish, 1 slop jar, 1 chamber, 1 tumbler, 1 looking glass, 3 towels, 1 hand lamp, 1 black-walnut center table, 1 camp chair, 1 hat rack, 1 stove, with zinc; 4 joints pipe and elbow, 1 ingrain carpet.

Room 32: 1 black-walnut folding bedstead, with 1 bar spring mattress, 1 wool mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, 2 pillow slips; 1 washstand, with wash bowl and pitcher; 1 soap dish, 3 towels, 1 looking glass, 1 curtain, 1 hat rack, 2 cane-seat chairs, 1 chamber, ingrain carpet.

Room 29: 1 black-walnut panel bedstead, with wire spring mattress, excelsior mattress, 2 sheets, 1 pair blankets, 1 bed spread, 2 pillows, and 2 pillow slips; 1 black-walnut washstand, with
246 wash bowl and pitcher; 1 slop jar, 1 soap dish, 1 chamber, 1 tumbler, 3 towels, 1 looking glass, 2 black-walnut cane-seat chairs, 1 hand lamp, 1 stand, 1 Brussels carpet.

Room 34: 6 sample tables, 10 wooden horses, 1 hand lamp, 1 wall lamp, about 15 yards muslin.

Room 33: 4 sample tables, 11 wooden horses, 1 stove, with zinc, 4 joints pipe, and 1 elbow; 1 coal scuttle, 1 fire shovel, 1 looking glass, 1 wooden chair, 7 sheets.

Bath-room: 3 wooden chairs, 3 soap dishes, 3 hat racks, 2 towels, 3 mats, 3 pieces oilcloth, 1 piece carpet.

Hall, 3rd floor: 2 hanging lamps, 1 ingrain hall carpet, 3 nickled spittoons, 1 black-walnut table, 5 hand lamps, Brussels stair carpet on back stairs, 2 water pitchers, Brussels carpet on front stairs.

Hall closet: 1 lot old carpet, 3 brooms, 2 water pails, 2 slop pails, 2 coal scuttles.

Room 28—linen room: 10 black waiters' coats, 12 white waiters' coats, 17 comforters, 1 office table, 8 lace curtains, 127 towels, 234 napkins, 39 table cloths, 5 bedspreads, 67 sheets, 67 pillow slips, 4 white aprons, 1 carpet stretcher, 1 dining-room screen, 32 comforters, 6 pair blankets, 10 pillows, 1 hatchet, 2 wooden chairs, 3 cloth-s baskets.

247 Store-room, basement: 9 stoves, 35 joints pipe, 8 elbows, 23 coal scuttles, 2 chambers, 10 glass egg cups, 2 dozen cups, 2 dozen saucers, 46 plates, 160 side dishes, 3 large water pitchers, 1 roll wire screen, 145 side dishes, 43 side dishes, 24 china egg cups, 29 plates, 42 lamp chimneys, 2 lantern globes, 1 coffee mill, No. 10; 8 pokers, 10 fire shovels, 10 flat-irons, 4 wooden trays.

Laundry: 1 ironing stove, 1 length pipe and 1 elbow, 2 clothes wringers, 10 flat irons, 1 coffee boiler, 1 washing tub, 3 water buckets, 1 ironing board, 1 ironing table, 1 water pitcher, 2 wash boards.

Exempted from levy upon claim def't.

EXHIBIT "B."

Linen room: 2 pairs blankets, 4 sheets, 6 pillow slips, 5 towels.

Room 16: 1 upholstered easy chair, 1 pair blankets.

Dining-room, kitchen, etc.: 1 silver-plated castor, 1 pitcher, 8 goblets, 1 pickle castor, 1 sil.-plated cream —, 1 do. sugar, 1 fancy pitcher, 1 sil.-plated cake —, 1 do. butter and knife, 1 do. syrup —, 1 sideboard, 2 salts —, 1 spoon holder, 1 pick holder, 3 dozen plates, 2 glass fruit dishes, 1 china fruit dish, 9 side dishes, 9 small platters, 15 sauce dishes, 10 doz. saucers, ½ doz. egg cups, 1 doz. creams, 1 doz. butter tips, 2 pitchers, ½ doz. bowls, 2 platters, 3 milk
248 pans, 1 lot tinware, 3 sauce pans, 1 frying pan, 1 tray, 1 platter, 1 celery holder, 1 teapot, 1 table, 8 chairs, 1 high chair.

Room 21: 1 stove & pipe, 1 spittoon, 1 willow rocker, 1 upholstered chair.

Room 10: Lace curtains, pier glass, parlor set, 4 pieces.
Room 9: 1 cherry bed-room set, 1 full set china chamber ware, bedding, 1 hanging lamp, 1 cherry table, 1 cane chair, 1 upholstered easy chair, 1 willow rocker.
Room 59: 1 table.
Room 11: 1 table, 1 rocker, 1 cane chair, 1 camp chair, 1 upholstered easy chair.
Room 12: 1 center table, 1 camp chair, 1 cane chair.
Room 15: I cane rocker.

EXHIBIT "C."

$80 rec'd of E. A. Ireland, U. S. marshal, in full for rent Broom Hotel.
Aug., 1885.

JOHN BROOM.

EXHIBIT "D."

AUG. 24TH, 1885.

Received from T. A. Perkins, deputy U. S. marshal, two and $\frac{60}{100}$ dollars, payment full accrued costs to date, case Utah National Bank of Ogden *vs.* M. H. Beardsley.
$2.50. A. C. EMERSON, *Clerk.*

EXHIBIT "E."

OGDEN, UTAH, *Aug. 24th*, 1885.

Received of E. A. Ireland, U. S. marshal, at the hands of T. A. Perkins, his deputy, three thousand five hundred sixteen $\frac{41}{100}$
249 (3,516.41) dollars in full of judgment, interests, & costs, as called for by the within execution.

KIMBALL & HEYWOOD.

(Endorsed:) Original No. 601. District court, first judicial district, county of Weber. The Utah National Bank of Ogden, plaintiff, against Mills H. Beardsley, defendant. Execution. Filed on return Oct. 1st, 1885. A. C. Emerson, clerk, by Isaac Goldberg, deputy clerk. Accrued costs, $2.50.

EXHIBIT "K."

In the District Court of the First Judicial District of Utah Territory.

Minutes of said Court, August 14th, 1885.

Minute Book "B," page 117.

TUESDAY, *August 4th, A. D.* 1885.

Court met pursuant to adjournment and was opened in due form.
Present: Hon. Orlando W. Powers, judge, and the officers of this court.
Minutes of proceedings of Aug. 1st read, approved, and signed.

(Here follows the regular business of the court at this session, which, however, includes nothing touching this case.)

Ordered that court be adjourned until Monday morning, September 21st, 1885, at 8.30 o'clock.

(Signed) ORLANDO W. POWERS, *Judge.*

250 EXHIBIT "A."

Know all men by these presents that I, E. A. Ireland, United States marshal in and for the Territory of Utah, by virtue of a writ of execution issued out of and under the seal of the district court in and for the first judicial district of the Territory of Utah, tested on the 12th day of August, A. D. 1885, upon a judgment recovered in said court on the 18th day of March, A. D. 1885, in favor of the Utah National Bank of Ogden, Utah, and against Mills H. Beardsley, to be directed and delivered, commanding me that of the personal property of the said Beardsley in my Territory I should cause to be made certain moneys in said writ specified, and if sufficient personal property of the said Beardsley could not be found that then I should cause the amount of said judgment to be made of the lands, tenemental, and real property belonging to said Beardsley on the day said judgment was docketed or at any time afterward, did, on the 13th day of August, A. D. 1885, levy on, take, and seize all and singular the personal property particularly mentioned in that certain schedule hereunto attached and made a part hereof, marked Exhibit "A," and did on the 22nd day of August, A. D. 1885, sell
251 the said personal property at public vendue, at the Broom Hotel, in Ogden City, where said property then was, between the hours of nine in the morning and five in the afternoon of said day, namely, at ten and a half o'clock in the morning of said day, after having first given notice of the time and place of such sale by advertising the same according to law, at which sale I struck off and sold the said personal property to John Broom for the sum of thirty-eight hundred and fifty-six dollars and seventy-five cents (3,856.75), the said John Broom being the highest bidder and that being the highest sum bidden for the same and the whole price paid for the same, the receipt whereof is hereby acknowledged.

In witness whereof I have hereunto set my hand this the 22nd day of August, A. D. 1885.

E. A. IRELAND,
U. S. Marshal,
By T. A. PERKINS, *Deputy.*

In presence of—
JAMES N. KIMBALL.
A. R. HEYWOOD.

(Endorsed:) Copy.

DEFENDANTS' EXHIBIT "F."

This indenture, made the twenty-second day of August, in the year of our of our Lord one thousand eight hundred and eighty-five, between John Broom, of Ogden, in the county of Weber and
252 Territory of Utah, the party of the first part, and E. A. Whittaker, of Salt Lake City and county, Utah Territory, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of four thousand one hundred and thirty-one dollars, lawful money of the United States of America, to him in hand paid, does grant, bargain, sell, convey, and confirm unto the said party of the second part and his heirs and assigns the following-described personal property, to wit: All the fixtures, furniture, ranges, stoves, crockery, china, and glassware, cooking utensils, and also all the furnishings, fixtures, and furniture of every description used in the hotel business, all situate in the Broom Hotel, corner Main & 5th streets, Ogden aforesaid.

Said property is situated at Ogden City, in the county of Weber and Territory of Utah, and is hereby warranted by the said party of the first part to be free and clear of all encumbrances or adverse claims and is to be and remain during the continuance of the lien hereby created in the possession of the mortgagor.

This conveyance is intended as a mortgage to secure payment of a certain promissory note bearing date August 22, 1885, executed by John Broom aforesaid, at Ogden, Utah, for the sum of four thousand one hundred and thirty-one dollars, and payable to the
253 order of E. A. Whitaker aforesaid ten months after date, with interest thereon at the rate of 1½ per cent. per month, payable monthly, negotiable and payable at Salt Lake City, Utah.

And these presents shall be void if such payment be made according to the tenor and effect thereof; but in case default be made in the payment of the principal or interest as in said note provided, or should any person remove or attempt to remove said property or any part thereof from the said county of Weber without first having obtained the written consent of the party of the second part hereto, his legal representatives or assigns, — at any time deem himself unsafe or insecure, then the said party of the second part, his legal representatives or assigns, are hereby empowered to take the said property or any part thereof, wherever the same may be found, and safely keep the same, at the expense of the said party of the first part, until the note secured hereby becomes due. and if it is not paid at maturity then proceed to sell said property in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making said sale and ten per cent. of the amount due *dollars*
254 for attorneys' fees, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first parst, his heirs or assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN BROOM. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. R. HEYWOOD.
JAMES N. KIMBALL.

TERRITORY OF UTAH, } ss:
County of Weber, }

John Broom, the party of the first part hereto, and E. A. Whitker, the party of the second part hereto, being first duly sworn, say that the within and foregoing mortgage is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the mortgagor.

E. A. WHITAKER.
JOHN BROOM.

Subscribed and sworn to before me this 22nd day of August, 1885.

A. R. HEYWOOD,
[SEAL.] *Notary Public.*

TERRITORY OF UTAH, } ss:
County of Weber, }

On this 22nd day of August, A. D. one thousand eight hundred and eighty-five, before me, Albert R. Heywood, a notary
255 public in and for said county, personally appeared John Broom, personally known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my seal, at my office, in Ogden, Utah Territory, the day and year in this certificate first above written.

A. R. HEYWOOD,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) Chattel mortgage from John Broom to E. A. Whittaker. Filed for record August 22, A. D. 1885, at 3 p. m. Recorded August 22, 1885. F. J. Cannon, county recorder, by Ben. E. Rich, deputy county recorder.

EXHIBIT "M."

In the District Court of the First Judicial District of the Territory of Utah.

JAMES C. ARMSTRONG, Plaintiff,
vs.
MILLS H. BEARDSLEY, JOHN BROOM, E. A. WHITAKER, Defendants.
} Notice of Intention to Move for a New Trial.

256 Take notice that the defendants, John Broom and E. A. Whitaker, intend to move *to* court to vacate and set aside

the decision and findings of the court against them rendered in the above court and for a new trial therein upon the following grounds, to wit:

1st. Insufficiency of the evidence to justify the judgment and decision of the court.

2nd. That the decision of the court is against law.

3rd. Errors of law occurring at the trial and excepted to by the said defendants.

Said motion will be made upon a statement of the case hereafter to be prepared.

JAMES N. KIMBALL,
A. R. HEYWOOD,
MARSHALL & ROYLE,
Att'ys for Def'ts Broom & Whitaker.

To Ransford Smith, Esq., and Mess. Sutherland & McBride, att'ys for pl'ff.

(Endorsed:) No. 697. In the district court, 1st judicial district. James C. Armstrong *vs.* M. H. Beardsley *et al.* Notice of intention of Broom & Whitaker to move for a new trial. Due service of this motion is hereby acknowledged July 3rd, 1886. Ransford Smith & Sutherland & McBride, att'ys for pl'ff. Filed July 3rd, 1886. T. A. Perkins, clerk. James N. Kimball, A. R. Heywood, Marshall & Royle, att'ys for B. & W.

257 EXHIBIT "N."

In the District Court of the First Judicial District of Utah Territory.

JAMES C. ARMSTRONG, Plaintiff, *vs.* M. H. BEARDSLEY *et al.*, Defendants. } No. 697. Order Extending Time to Prepare and Serve Statement, &c.

On application of the defendants, John Broom and E. A. Whitaker, and good cause being shown therefor, it is ordered that they do have ten days from and after July 13th, 1886, to prepare and serve statement of the case on motion for new trial, and the time to prepare and serve said statement is hereby extended ten days from said date.

ORLANDO W. POWERS, *Judge.*

In open court, Wednesday, July 17th, A. D. 1886.

Certificate.

We do hereby certify that the foregoing statement is correct.

RANSFORD SMITH AND
SUTHERLAND & McBRIDE,
Att'ys for Pl'ff.

J. N. KIMBALL,
A. R. HEYWOOD,
MARSHALL & ROYLE,
Att'ys for Def't.

We have examined the foregoing statement and hereby
258 stipulate that the defendants Broom and Whitaker can present the same to the judge for settlement and allowance at any time without further notice to us as plaintiff's attorneys. We hereby, on the part of the plaintiff, waive the statutory notice.

SUTHERLAND & McBRIDE,
Att'ys for Pl'ff.

(Endorsed:) 697. District court, 1st district. James C. Armstrong *vs.* M. H. Beardsley *et al.*, defendants. Broom and Whitaker's statement of case on motion for a new trial. Due notice of this statement is hereby acknowledged July 23d, 1886. Southerland and McBride, att'ys for pl'ff. Filed July 29th, 1886. T. A. Perkins, clerk. James N. Kimball, A. R. Heywood, Marshall and Royle, att'ys for def'ts Broom & W.

In District Court, 1st Judicial District, Utah Territory.

JAMES C. ARMSTRONG, Plaintiff,
vs.
M. H. BEARDSLEY, JOHN BROOM, and E. A. WHITAKER, Defendants.
} Notice — Appeal.

Take notice that defendants, John Broom and E. A. Whitaker,
259 hereby appeal to the supreme court of Utah Territory from the judgment entered in said district court on June 2, 1886, in favor of plaintiff and against defendant, and from the whole thereof, and also from the order denying (refusing) said defendant-, John Broom and E. A. Whitaker'-, motion for a new trial, made and entered in the minutes of said district court November 15, 1886.

JAMES N. KIMBALL,
ALBERT R. HEYWOOD,
Att'ys for Broom & Whitaker.

MARSHAL & ROYLE, *Counsel.*

To Ransford Smith, Esq., attorney for plaintiff.

(Endorsed:) No. 697. 1st district court, Utah Ty. James C. Armstrong — M. H. Beardsley *et al.* Notice of appeal. Due service of this notice is hereby acknowledged Nov. 30th, 1886. J. G. Sutherland & Ransford Smith, att'ys for pl'ff. Filed Nov. 30th, 1886. T. A. Perkins, clerk, by J. F. Ledwidge, deputy. J. N. Kimball, A. R. Heywood, for Broom and Whitaker.

In the District Court, 1st Judicial District, Utah Territory.

JAMES C. ARMSTRONG, Plaintiff,
vs.
M. H. BEARDSLEY, JOHN BROOM, and E. A. WHITAKER, Defendants.
} Undertaking on Appeal.

260 Whereas defendants, John Broom and E. A. Whitaker, are about to appeal to the supreme court of Utah Territory from

a judgment rendered against them and in favor of plaintiff on June 2, 1886, and from an order denying (refusing) said defendants' motion for a new trial, made and entered November 15, 1886:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents and householders of said district, do hereby jointly and severally undertake and promise on the part of said Broom & Whitaker that they will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Witness our hands and seals November, 1886.

W. N. SCHILLING. [SEAL.]
L. B. ADAMS. [SEAL.]

UTAH TERRITORY, } ss:
Weber County, }

Watson N. Schilling and Louis B. Adams, the foregoing sureties, on oath, each for himself, says: I am worth the amount
261 (sum) specified in foregoing undertaking over and above all my just debts and liabilities, exclusive of property exempt from execution, and am a resident and householder within this county.

W. N. SCHILLING.
L. B. ADAMS.

Subscribed and sworn to before November 30th, 1886.
[SEAL.] JAMES N. KIMBELL,
Notary Public.

(Endorsed): No. 697. In the district court, 1st judicial district. James C. Armstrong *vs.* M. H. Beardsley *et al.* Undertaking of defendants, Broom and Whitaker, on appeal. Filed Nov. 30th, 1886. T. A. Perkins, clerk, by J. S. Ledwidge, deputy. J. N. Kimball, A. R. Heywood, att'ys for B. & W.

TERRITORY OF UTAH, } ss:
County of Weber, }

I, T. A. Perkins, clerk of the district court for the first judicial district of the Territory of Utah, do hereby certify that the foregoing are full, true, and correct copies of the original complaint, summons, certified copy of order allowing supplemental com-
262 plaint filed and making new parties, order making new parties and granting leave to file an amended and supplemental complaint, stipulation, amended and supplemental complaint; demurrer of defendants Broom and Whitaker to amended and supplemental complaint, demurrer of M. H. Beardsley to the amended and supplemental complaint, orders overruling demurrers, separate answer of E. A. Whitaker and John Broom to the amended and supplemental complaint, findings and decisions, decree and certificate of judgment-roll, statement of the order over-

ruling motion for new trial, case to be used on motion for new trial by the defendants, John Broom and E. A. Whitaker, and in the event of an appeal by them on such appeal notice of appeal and undertaking on appeal, now on file in my office.

Witness my hand and the seal of said court, at Ogden City, this 7th day of January, A. D. 1887.

[SEAL.]

T. A. PERKINS, *Clerk*,
By J. F. LEDWIDGE,
Deputy Clerk.

263 TERRITORY OF UTAH, }
County of Weber. }

I, the undersigned, judge of the court in which the within entitled action was — suit, do hereby, on application of the attorney for plaintiff and the attorneys of John Broom and E. A. Whitaker, defendants and appellants herein, good reason being shown therefor order that the printing of this record for the supreme court be, and the same is hereby, dispensed with in case the cause is heard at the next Jan. term, 1887, or until —.

Ogden, January, 8th, 1887.

H. P. HENDERSON, *Judge.*

Endorsed: Filed January 10th, 1887. E. T. Sprague, clerk.

264 & 265 FRIDAY, *January 21st, A. D.* 1887.

A session of the supreme court of Utah Territory was held this day.

* * * * * * *

JAMES C. ARMSTRONG, Respondent, }
vs. } From 1st Dist.
JOHN BROOM *et al.*, Appellants. }

This cause, coming on regularly for hearing, was argued by J. C. Royle and J. N. Kimball, for appellants; J. G. Sutherland and Ransford Smith, for respondent, submitted, and taken under advisement.

SATURDAY, *February 26th, A. D.* 1889.

* * * * * * *

JAMES C. ARMSTRONG, Respondent, }
vs. } From 1st Dist.
JOHN BROOM *et al.*, Appellants. }

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here ordered and adjudged that the judgment of the district court therein be, and is hereby, affirmed, and that respondent have and recover of and from said appellants his costs herein.

Thereafter said appellants, by their counsel, prayed
266 & 267 the allowance of an appeal from this judgment to the Supreme Court of the United States, and asked that the amount of a supersedeas bond thereon, as well as of bond for costs, be

now fixed. Counsel for respondent suggesting that the amount involved in this cause is insufficient to give jurisdiction to the U. S. Supreme Court, the application is taken under advisement.

THURSDAY, *March* 3*d*, *A. D.* 1887.

* * * * * * *

JAMES C. ARMSTRONG, Respondent,
vs.
JOHN BROOM *et al.*, Appellants. } From 1st Dist.

In this cause and on the application therefor made the 26th day of February ultimo, ordered that the appeal then asked be, and hereby is, allowed, the amount of a supersedeas bond to be given thereon be, and is hereby, fixed at ten thousand dollars, and the amount of a bond for costs on such appeal be, and is, fixed at $300.00.

268 In the Supreme Court of Utah Territory.

JAMES C. ARMSTRONG, Plaintiff and Respondent,
vs.
JOHN BROOM *et al.*, Defendant- and Appellant-.

ZANE, *C. J.:*

This action was instituted to foreclose a chattel mortgage given by defendant Beardsley to the plaintiff on the 14th day of January, 1885, and duly recorded, to secure his promissory note of that date for the sum of $8,000.00.

The complaint was filed on the 22d day of July, 1885, and a decree was rendered for the plaintiff for the principal and interest due, directing a sale of the mortgaged property to satisfy the same, with costs, and the Utah National Bank recovered a judgment against the same defendant on March 18th, 1885, on which an execution issued August 13th of the same year, which was levied the same day, on the property mortgaged, and it was sold to defendant Broom on the 22d day of the same month and by him mortgaged the same day to defendant Whittaker. The two defendants last named
269 claim the title to the property by virtue of this sale. This appeal is from the decree of foreclosure and from the order denying a motion for a new trial. Sec. 5 of chapter 21, Laws of Utah, 1884, is as follows: "Any mortgage of personal property acknowledged and filed as hereinafter provided shall thereupon, *is* made in good faith, be good and valid as against the creditors of the mortgagor and subsequent purchasers and mortgagors from the time it is so filed for record until the maturity of the entire debt or obligation for the security of which the same was given and for a period of ninety days thereafter, provided the entire time shall not exceed one year." The ninety days after the maturity of the note secured by the mortgage in this case expired on August the 12th, 1885, and the *lis pendens* was filed the preceding day (the action having been commenced on the 22d day of the preceding

month); the levy was made the day following that on which the ninety days expired.

In view of the premises, the appellants, Broom and Whit-
270 taker, insist their rights to the property in question are superior to the plaintiff's; that the plaintiff's lien by virtue of his mortgage and the pendency of the foreclosure action was invalid as against the levy of the execution, because the property was found in the actual possession of the mortgagor and levied upon the day after the ninety days had expired.

We are of the opinion that a mortgage on chattels, though made in good faith and duly recorded, is invalid as against the creditors of the mortgagor and subsequent purchasers from him, if the property remains in his possession after the expiration of one year or after the expiration of the ninety days in the fifth section mentioned, without any measures taken to foreclose. So the question arises, What effect did the institution of the suit and the filing of the *lis pendens* have? The ninth section of chapter 21, mentioned above, provides that "an action for the foreclosure of a mortgage on personal property or the enforcement of any lien thereon, of whatever nature, may be commenced, conducted, and concluded in the same manner as provided by law for the foreclosure of a
271 mortgage or lien on real property," &c. Section 266, page 200, Laws of Utah, 1884, provides that a notice of the pendency of an action affecting the title or the right to possession of real property may be filed for record with the recorder of the county, &c., and that from the time of filing such notice only shall a purchaser or incumbrancer of the property be deemed to have constructive notice of the pendency of such action. This provision relates to actions for real property and to constructive notice of the pendency thereof. The court below found that the defendants Broom and Whittaker had actual notice of plaintiff's mortgage and of the suit to foreclose it before they acquired any interest in the property in dispute. This finding appears to be supported by the evidence, and it does not appear that there was any unreasonable delay in the prosecution of the foreclosure suit to a final decree. This presents the further question, Could the defendants Broom and Whittaker, with actual notice of the mortgage and of the pendency of the suit instituted before the expiration of the ninety days, acquire
272 a valid title as against the plaintiff? The foreclosure of the mortgage by plaintiff was an appropriated remedy to subject the property therein described to the payment of the debt secured thereby. The action having been commenced by plaintiff while the lien of the mortgage was good as against creditors, it kept the lien alive, and continued it until the decree and sale under it perfected his right with respect to it and passed the title to the purchaser. If the plaintiff had failed to take any steps to foreclose his mortgage until after the ninety days had expired and the mortgage had ceased to be a lien as against creditors and purchasers, their rights might have intervened and become superior to those of the plaintiff; but the creditors, with notice that plaintiff was proceeding to subject the property to the payment of the debt secured in the mode prescribed by

law, could not acquire rights superior to the decree which might be rendered. When the ninety days expired the plaintiff was
273 not relying upon his mortgage alone; he had availed himself of the remedy which the law gave him. That added additional life and vitality to his rights under the mortgage and resulted in a perfect right. The remedy converted the property mortgaged into money and gave that to the plaintiff. This was the end in view when the mortgage was made, if the debt should not be paid. The mortgage and the remedy together held the property and accomplished the end in pursuance of and by virtue of both.

The statute authorizes the foreclosure of a chattel mortgage by an action, as we have seen. But if between the day the mortgage would cease to be a lien without any steps to foreclose it and the day of the decree the rights of creditors might intervene and deprive the mortgagee, without his fault, of the benefit of the lien, the object of the action instead of being the means of perfecting plaintiff's right, the remedy would afford an opportunity for its destruction.

The property in question was described in the mortgage, and that was made a part of the complaint. In volume 2, Leading
274 Cases in Equity, Hare and Wallace's Notes, p. 170, the rule of *lis pendens* is stated thus: "A purchaser will also be affected with constructive notice whenever his purchase is made during the prosecution of a suit brought to enforce an adverse claim or title which is set forth with sufficient certainty and distinctness to apprise him of its being on the property purchased." At page 173, same book, is the further statement of the rule. "In Murray *vs.* Synburn, 2 Johnson's Chancery, 444, the principles asserted in Murray *vs.* Balou were held to apply to choses in action as well as to real estate, * * * and there are several cases which sustain the idea that whenever personal property falls within the jurisdiction of chancery by becoming the subject of a suit for specific delivery or performance, * * * it will fall within the rules which apply under similar circumstances to land, and cannot be discharged from the equity of the complainant by a sale *pendente lite*."

In case of an equitable action to foreclose a mortgage or to enforce a lien, when the property is sufficiently described, we
275 see no reason why the same rule as to *lis pendens* should not apply as is provided in similar actions against real estate. The suit of Thompson *vs.* Van Vechten, vol. 5, Abbott's Practice Reports, page 458, was to determine the priority of the claims of the respective parties to the proceeds of the sale of the steamboat Alida. The priority of the rights of one of the parties depended upon a sale under a chattel mortgage held by one Dunlap, who, by his agent, had advertised the boat to be sold in pursuance of the mortgage, but had not taken actual possession. The court, in its opinion, said: "On June 28th, 1884, Dunlap took measures to foreclose the mortgage and sell the vessel. This was equivalent to an assumption of possession." The case of Otis *vs.* Sill, vol. 8 Barbour's Supreme Court Reports, 102, was brought for taking and detaining personal property. The plaintiff claimed by virtue of a chattel

mortgage and the defendant by virtue of an execution on a judgment against the mortgagor. At the time of the levy the plaintiff had not taken actual possession of the property or filed a copy of the mortgage within 30 days previous to the expiration of the
276 year. The court said: "The plaintiff's mortgage was dated the 18th day of October, 1847, and was filed in the office of the county clerk on the 19th of October, 1847. On the 16th of October, 1848, the plaintiff caused an inventory of the property which he claimed was embraced by the mortgage to be taken and the property to be advertised for sale under the mortgage. Advertising the property for sale under the power of sale contained in the mortgage previous to the expiration of one year from the time of the filing of the mortgage, in my judgment, excused the plaintiff from the obligation of filing a copy of the mortgage within 30 days previous to the expiration of the year, as required by the 3d section of the act in relation to chattel mortgages (Laws of 1833, p. 402). The 3d section of this act is evidently applicable only to cases when the mortgagee allows the mortgagor to continue in possession of the mortgaged property after the expiration of the year without taking the property into his actual possession or
277 adopting some proceeding to enforce the forfeiture of the mortgage, or to sell the equity of redemption of the mortgagor previous to the expiration of the year from the filing of the mortgage." In holding that the interests of the defendants Broom and Whittaker under the levy and sale by virtue of the execution on the judgment of the Utah National Bank against Beardsley *was* subject to plaintiff's rights under his mortgage and decree we are of the opinion that the trial court committed no error.

And we are also of the opinion that the evidence authorized the finding that the mortgage was given to secure a *bona fide* debt and in good faith. After a careful consideration of this record we find no error in it.

The decree of the court below is affirmed.

Boreman, justice, concurs.
Henderson, " "

Endorsed: Filed Feb'y 26th, 1887. E. T. Sprague, clerk.

278 In the Supreme Court of the Territory of Utah.

JAMES C. ARMSTRONG, Respondent,
vs.
JOHN BROOM and E. A. WHITAKER, Impleaded with MILLS H. BEARDSLEY, Appellants.

Know all men by these presents that we, John Broom, of Ogden City, in the county of Weber and Territory of Weber, and E. A. Whitaker, of Salt Lake City, in the county of Salt Lake and Territory of Utah, as principals, and Watson H. Shilling, of Ogden City, in the county of Weber and Territory of Utah, and John E. Dooley,

of Salt Lake City, in the county of Salt Lake and Territory of Utah, as sureties, are held and firmly bound unto James C. Armstrong, of Ogden City, in the County of Weber and Territory of Utah, in the sum of three hundred dollars, to be paid to the said James C. Armstrong, his executors, administrators, or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us and our and each of our heirs, executors, and administrators and every of them firmly by these presents.

279 Sealed with our seals and dated the eighth day of March, A. D. 1887.

Whereas, on the 26th day of February, A. D. 1887, the supreme court of the Territory of Utah did make and enter a judgment in the above-entitled action affirming a judgment of the district court of the first judicial district of Utah Territory rendered on the 24th day of June, A. D. 1886, in an action then pending in said district court, wherein the above-named James C. Armstrong was plaintiff and the above-named John Broom and E. A. Whitaker, impleaded with Mills H. Beardsley, were defendants, in favor of said James C. Armstrong and against said John Broom and E. A. Whitaker; and whereas the said John Broom and E. A. Whitaker did, on the said 26th day of February, A. D. 1887, pray in open court an appeal from said judgment of said supreme court of Utah Territory to the Supreme Court of the United States, which appeal was by said supreme court of Utah Territory, in open court, on the 3d day of March, A. D. 1887, allowed, and a cost bond on such appeal

280 was by it fixed at the sum of three hundred dollars:

Now, therefore, the condition of this obligation is such that if the above-bounden John Broom and E. A. Whitaker shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN BROOM. [SEAL.]
E. A. WHITAKER. [SEAL.]
W. H. SHILLING. [SEAL.]
JOHN E. DOOLEY. [SEAL.]

In the presence of, as to Broom & Shilling—
L. R. ROGERS.
A. HEYWOOD.

TERRITORY OF UTAH, } ss:
County of Weber, }

Watson N. Shilling, one of the sureties in the above bond, being duly sworn, deposes and says that he is a resident and freeholder within said Weber county and worth the sum specified in said bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

W. N. SHILLING.

Subscribed and sworn to before me March 8th, 1887.

LINDSAY R. ROGERS,
Notary Public.

[SEAL.]

281 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

John E. Dooley, one of the sureties in the above bond, being first duly sworn, says: I am a resident and freeholder within said county of Salt Lake and am worth the sum specified in said bond as the penalty thereof over and above all my just debts and liabilities, exclusive of property exempt from execution.

JOHN E. DOOLEY.

Subscribed & sworn to before me March 9th, 1887.

HARRY F. DUKE,
Notary Public.

[SEAL.]

The above bond is approved.

CHARLES S. ZANE,
Chief Justice.

We are satisfied with the above bond—penalty, form, and sureties.

SUTHERLAND & McBRIDE.
Pl'f's Att'ys.

Endorsed: Filed March 9th, 1887. E. T. Sprague, clerk.

282 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of an appeal allowed by said court in the cause therein lately pending of James C. Armstrong, respondent, *vs.* John Broom *et al.*, appellants, do return hereto attached a transcript of record, proceedings, opinion, and bond on appeal in and of said court in said cause to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record, proceedings, opinion, and bond is a full, true, correct, and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court, Utah Territory, United States of America.

In witness whereof I have hereunto set my hand and the seal of said supreme court of Utah Territory, at Salt Lake City, this 2nd day of May, A. D. 1887.

E. T. SPRAGUE,
Clerk of Supreme Court, Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 328. John Broom and E. A. Whitaker, appellants, *vs.* James C. Armstrong. Filed May 24, 1887.

OCTOBER TERM, 1887.

No. 929.

JOHN BROOM and E. A. WHITTAKER,

Appellants,

vs.

JAMES C. ARMSTRONG.

BRIEF FOR APPELLANTS.

By SAMUEL SHELLABARGER,

JEROME B. [illegible]

IN THE

Supreme Court of the United States.

JOHN BROOM and E. A. WHITTAKER,
Appellants,

vs.

JAMES C. ARMSTRONG.

No. 328.

Synopsis of the Record.

1885: July 22.—In District Court, First Judicial District, Utah Territory, in Weber County, James C. Armstrong brought suit against *Mills H. Beardsley*, on a note for eight thousand dollars ($8,000) (Rec., 1), asking for a judgment for seven thousand eight hundred dollars ($7,800), and for $780, ten (10) per cent. on said principal, attorneys' fees, provided for in the mortgage; and, also, for sale of certain chattels covered by a chattel mortgage, Exhibit "A" (Rec., 3), dated January 14, 1865, securing payment of said note.

1885: September 21.—Armstrong allowed to file supplemental complaint, making John Broom and E. A. Whittaker defendants; and they are made defendants, accordingly, September 21, 1885 (Rec., 7 to 14).

Armstrong's said supplemental petition, which makes Broom and Whittaker defendants, sets forth how the interest of these defendants was acquired; Broom's being by purchase at a sale on execution, on a judgment dated March 18, 1885 (Rec., 14), in favor of the Utah National

Bank of Ogden, for three thousand one hundred and sixty dollars ($3,160), such execution being dated August 12, 1885, and, on the 13th of August, 1885, delivered to E. A. Ryon, Marshal for said Territory, commanding him to make said judgment out of the property of the defendant, *Mills H. Beardsley*; and which execution was levied, August 13, 1885, by said Marshal, on the property in dispute (Rec., 9 and 14); and said Whittaker's interest was acquired by a mortgage to him by Broom (Rec., 9), such mortgage being made August 22, 1885, securing the payment of four thousand one hundred and thirty-one dollars ($4,131) advanced to Broom, etc.

1885: October 1.—Defendants, Broom and Whittaker and Mills H. Beardsley, respectively, demurred to the amended and supplemental complaint, as not showing facts constituting cause of action (Rec., 24, 25).

1885: November 18.—Both of said demurrers overruled (Rec., 25, 26).

1885: December 22.—Answer of defendants, Broom and Whittaker, to amended complaint filed (Rec., 27–32).

The answer denies most of the material averments of the bill, and sets up various defenses, which included the said levy on said property, its purchase at judicial sale, by Broom, the invalidity of the lien of said chattel mortgage, after the expiration of ninety days from the maturity of the said note, secured by the chattel mortgage, and various other grounds of defense not necessary to be here recapitulated.

1886: June 24.—The Court made a finding of facts and law (Rec., 32–38).

The facts and conclusions of law found by the Court are set forth in record, 32 to 38, inclusive.

1886: June 24.—Court rendered a decree (Rec., 38 to 40), which was appealed to the Supreme Court of the Territory, finding that Beardsley was liable to Armstrong for $8,506.40, $7,726.40 of which should bear interest at one per cent. per month from June 24, 1886, and $780 thereof should bear ten per cent. interest from June 24, 1886, and that the whole thereof is a valid lien upon the property described in amended complaint; that the terms of the mortgage have been broken, and plaintiff is entitled to have the mortgage enforced and foreclosed, and the property sold, as prescribed by law, and proceeds applied upon the payment of said debt, and directing that the property be sold by the marshal, or the sheriff, &c.

1886: November 15.—Court overruled the motion of Broom and Whittaker for a new trial; to which they excepted (Rec., 41).

1886: July 29.—Statement for new trial commences page 41, and extends to page 89, of the record; approved July 29, 1886 (Rec., 89), and was filed July 29, 1886.

1886: November 30.—An appeal to the Supreme Court of Utah Territory, by Broom and Whittaker, was taken, was filed November 30, 1886, and was from said decree, and also from the order overruling the motion for a new trial (Rec., 120).

1887: February 26.—The Supreme Court of the Territory affirmed the judgment of the District Court (Rec., 122), and that affirmance is the decree brought to this Court by the present appeal.

Of the profuse finding of facts by the Court (found in the record extending from page 32 to 38), we think that the ones which we shall desire to bring into special notice

in this discussion, and which really control the case, are the following:

(1.) That the debt of Beardsley to Armstrong, secured by the chattel mortgage (Ex. A, Rec., 3), matured more than ninety days before August 13, 1885.

(2.) That the mortgagor remained in possession of the chattel property, covered by said mortgage, up to the 13th of August, 1885, and until it was taken from his possession by the marshal's levy of execution.

(3.) That on the 22d of July, 1885, Armstrong commenced suit, by the petition found in record, 1 to 3, to foreclose said mortgage which was pending at the time of the levy of execution by the marshal, named below; and that summons was served on Beardsley July 23, 1885, and was duly returned July 30, 1885; and that on the 11th of August, 1885, plaintiff filed with the recorder a notice of the pendency of said action, commenced July 22, 1885; and that the supplemental petition (Rec., 7 to 14) was filed by leave September 21, 1885; and that in said foreclosure suit a decree was rendered June 24, 1886 (Rec., 38 to 40), and which decree was, on appeal to the Supreme Court of the Territory, affirmed, March 3, 1887 (Rec., 122, 123); such decree of affirmance being that brought to this Court by the present appeal.

(4.) That on the 18th March, the Court rendered a judgment by default, under the below quoted provisions of the statute, on an indebtedness, in favor of the Utah National Bank, against Beardsley for $3,166 and costs; and that the marshal of the territory levied an execution, issued on the said judgment in favor of the bank, on the 13th of August, 1885, on the property named in Schedule A, attached to stipulation.

(5.) On the 22d of August, 1885, after due notice, at public auction by the marshal, the appellant, Broom, purchased the property, being the highest bidder, and

paid therefor, and the marshal made return of such sale, and satisfied the judgment in favor of the bank.

(6.) That at the time of this levy, and of the purchase by Broom, the appellants and said marshal, knew of the pendency of said foreclosure suit, and of the facts so far as they existed on which the foreclosure suit was based, and, on demand of Armstrong, refused to surrender said levy and property.

Assignments of Errors.

The Supreme Court of the territory erred in sustaining the ruling of the Distrtct Court in the matters following:

(1.) In admitting, as competent evidence, the said chattel mortgage from *Beardsley* to plaintiff, as against defendants, Broom and Whittaker. (*See grounds of objection, Rec., top page 42.*)

(2.) In permitting the witness, R. Smith, to testify as to his having given Broom and Whittaker notice of Armstrong's lien. (*See grounds of objection, Rec., 59, fol. 126; also Rec., 86.*)

(3.) In refusing to strike out the evidence of said R. Smith, as to said notice. (*See grounds of motion to strike out, Rec., 60, fol. 128; also Rec., 86, fol. 186.*)

(4.) In sustaining the finding that said note was given for full value.

(5.) In admitting the other evidence, which was duly objected to by appellants at the trial; and, also, in excluding the evidence which was excluded on the objection of the appellee.

(6.) In finding that the said alleged lien, of said chattel mortgage, contained after the ninety days from the maturity of the note secured by the mortgage, had expired.

(7.) In finding that the bringing of said foreclosure suit continued the existence of the lien created by said

chattel mortgage, after the expiration of ninety days from the maturity of said note secured by such mortgage.

(8.) In finding that the appellee, Armstrong, had, in virtue of the lien created by said chattel mortgage, any interest in said property on the 13th of August, 1885, as against the levy and sale, under which appellant, Broom, purchased said property.

(9.) In rendering a judgment and decree in favor of the appellee, instead of one in favor of appellants.

(10.) In overruling the motion of appellants for a new trial.

(11.) For other errors appearing in said record.

Statutes.

The statutes brought into notice by the present case are as follows:

Section 2801, of the Compiled Laws of Utah, provides:

"No mortgage of personal property shall be valid against the rights and interests of any person, (other than parties thereto,) unless the possession of such personal property be delivered to, and retained by, the mortgagee, or unless the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of the parties thereto, or, in case any party is absent, an affidavit of the parties present and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor."

Section 2802 provides:

"Every mortgage of personal property shall be witnessed and acknowledged by the mortgagor or person executing the same, and, when the mortgage debt is satisfied, shall be released by the mortgagee in the same manner as is provided for mortgages of real property."

Section 2803 is as follows:

"Every mortgage of personal property, together with the affidavit and acknowledgment thereto, shall, to constitute notice to third persons, be filed for record in the officer of the recorder of the county where the mortgagor resides; or, in case he is a non-resident of this territory, then in the respective offices of the recorders of each and every county where the personal property may be at the time of the execution of the mortgage; and each of the said recorders shall, on receipt of such mortgage, endorse thereon the time of filing the same with him, and shall promptly record the same, together with said affidavit and acknowledgment, in a book to be kept in his office, properly indexed, and specially provided for the record of chattel mortgages, and, when so recorded, deliver the same to the mortgagee."

Section 2805 is the one quoted in the opinion of the Court (Rec., 123), and is as follows:

"Any mortgage of personal property, acknowledged and filed as hereinbefore provided, shall, thereupon, if made in good faith, be good and valid as against the creditors of the mortgagor and subsequent purchasers and mortgagees, from the time it is so filed for record until the maturity of the entire debt or obligation, for the security of which the same was given, and for a period of ninety days thereafter, provided the entire time shall not exceed one year."

The provisions of the statute under which the judgment by default in favor of the Utah National Bank was (as found folio 75 of the record) "*duly given and made and entered,*" on said suit, commenced February 17, 1885 (R., 103), against Beardsley, on the 18th of March, 1885, for $3,166, and on which the execution was levied on the 13th of August, 1885 (Rec., 35, fols. 75 and 76), are found in section 3345 of the Compiled Laws of Utah (being section 460 of the original statute), which section is in these words:

"Judgment may be had, if the defendant fail to answer

the complaint, as follows: In an action arising upon contract for the recovery of money or damages only if no answer has been filed with the clerk of the Court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants, in the case provided for in section two seventy-one (271)."

[Section 271 is a section providing for service by publication.]

And it is held, in Nounnan *v.* Toponce (1 Utah, 168), that, in entering a judgment by default, the clerk acts ministerially, and not judicially, the Court citing—

Gray *v.* Fulmer, 28 Cal., 416.
Williams *v.* Eldridge, 27 Cal., 495; 28 Cal., 212.
Wilson *v.* Cleveland, 30 Cal., 192.
Kelly *v.* Van Austen, 17 Cal., 564.

Section 2837 of the said Compiled Laws is a section of their Statute of Frauds of 1876, and was section 7 of said Statute of Frauds, and is as follows:

"Every sale made by a vendor of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of the possession of the thing sold or assigned, shall be conclusive evidence of fraud against the creditors of the vendor or assignor, or subsequent purchasers in good faith. The word '*creditors*' as used in this section shall be construed to include persons who shall be creditors of the vendor or assignor at any time while such goods and chattels shall remain in his possession or under his control."

Section 3460 of said Compiled Laws, so far as here material, reads as follows:

"There can be but one action for the recovery of any

debt, or the enforcement of any right, secured by mortgage upon real estate or personal property; which action must be in accordance with the provisions of this chapter. In such action the Court may, by its judgment, direct a sale of the encumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the Court and the expenses of the sale and the amount due to the plaintiff; and sales of real estate under judgment of foreclosure of mortgages and liens are not subject to redemption as in case of sales under execution."

Section 2809 of said Compiled Laws reads as follows:

"An action for the foreclosure of a mortgage on personal property, or the enforcement of any lien thereon, of whatever nature, may be commenced, conducted, and concluded in the same manner as provided by law for the foreclosure of a mortgage or lien on real property and without the right of redemption."

Section 3206 provides:

"In an action affecting the title, or the right of possession, of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file for record, with the recorder of the county in which the property, or some part thereof, is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record, only shall a purchaser or encumbrancer of property affected thereby, be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

Brief.

We believe that these are all the provisions of the Utah statutes which the present case brings into special notice.

From the foregoing statement, we think it is quite apparent that the main question in the present case is:

Whether that provision of the above-cited section, 2805, which declares, that mortgages of personal property, made in good faith, as provided in said statute, and recorded, shall be valid against creditors and subsequent purchasers from the time it is filed for record until the maturity of the debt secured by the mortgage, "*and for a period of ninety days thereafter*," properly construed, means that it *shall not be valid after the expiration of ninety days from the maturity of the secured debt, where possession of the property is not taken by the mortgagee;* and whether, moreover, the said pendency of the suit to foreclose, and the filing of the *lis pendens*, prevent the termination of the said lien, as between the mortgagor and his creditors, which would, but for said *lis pendens*, be accomplished by the provisions of section 2805 of said Compiled Laws.

We now proceed to the consideration of this question, whether any statutory or other lien, operative as against appellants, existed on the chattel property covered by this mortgage on the 13th of August, 1885, at the time of the levy, under which appellant, Broom, purchased.

It will be convenient, in considering this question, to first consider whether any lien created by the chattel mortgage, so existed on said 13th of August, viewed *independently* of the effect of the *lis pendens* relied on in the case, and independently of the effect of the actual notice to appellee of the existence of said chattel mortgage, and of the other facts set up in the original complaint of appellee.

Duration of Mortgage Considered Independently of Lis Pendens.

The following considerations we submit as showing that, considered independently of said *lis pendens* and of said notice, the said chattel mortgage lien terminated at the expiration of ninety days from the maturity of the debt secured by the mortgage, to wit, on the 12th of August, 1885 (Rec., p. 123), and did not, therefore, exist at the date of the levy on the 13th of August.

1. The opinion of the Supreme Court below (Rec., 124, fol. 270), on this point, states as follows:

"We are of opinion that the mortgage of chattels, though made in good faith and duly recorded, is invalid as against the creditors of the mortgagor and subsequent purchasers from him, if the property remains in his possession after the expiration of one year, or after the expiration of the ninety days, in the fifth section mentioned without any measure taken to foreclose."

2. That when said section 2805 (cited Rec., 123), provides that—

"Any mortgage of personal property, acknowledged and filed as hereinbefore provided, shall, thereupon, if made in good faith, be good and valid as against the creditors of the mortgagor, and subsequent purchasers, and mortgagees, from the time it is so filed for record until the maturity of the entire debt or obligation, for the security of which the same was given, *and for a period of ninety days thereafter*, provided the entire time shall not exceed one year,"—

it is, in substance and legal effect, an express statutory provision that, in the absence of possession taken by the mortgagee, the said lien terminates at the expiration of said ninety days.

This is so clearly the effect of said section as to not seem to leave any room for construction or interpreta-

tion. To say that the validity of the mortgage continues after the expiration of ninety days, notwithstanding this statute is literally to repeal the ninety days clause of the section.

3. The above-cited section 2837 of the Compiled Laws when it enacts that—

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every *assignment* of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an *actual and continued change of the possession of the thing sold or assigned, shall be conclusive evidence of fraud against the creditors of the vendor or assignor, or subsequent purchasers in good faith*"—

is a provision to be read in *pari materia* with section 2805.

And section 2837, in clear and mandatory words, renders the present assignment or sale absolutely void as against creditors, except as it is rescued from being void by said chattel mortgage law.

But said chattel mortgage law rescues no sale or assignment, unaccompanied by delivery of possession, from being absolutely void except for ninety days after the maturity of the debt secured by the chattel mortgage.

Putting, therefore, these two sections together, we have an express statute law, totally free from ambiguity and clearly mandatory in its requirements, enacting that no sale or assignment of chattels, whether made by a chattel mortgage executed, acknowledged, and recorded, as provided in said mortgage statute, or otherwise, when unaccompanied by delivery of possession to the vendee or assignee, shall ever be otherwise than absolutely void after the expiration of ninety days from the maturity of the debt secured by the mortgage.

The propositions thus far stated do not seem to have been disputed below, and, on the contrary, were, as we have seen, admitted by the Court (Rec., 124).

The appellee, and the Court below, therefore, resorted to the said *lis pendens*, and the said notice to appellants and to said marshal of the facts averred in the original and supplemental petition of appellee, as an escape from this express provision of the statute so terminating said lien on the 12th of August, 1885.

That is, they resort to "interpretation" and "construction," in order to get clear of the provisions of the statute terminating said lien at the end of said ninety days.

We are, therefore, brought to the question whether this resort to interpretation, in order to avoid the unambiguous and express provisions of this statute, can be successful.

And first of all under this head of "interpretation," the Court will please keep carefully in mind what rule of construction the Courts have applied to the interpretation of this very species of legislation, regarding chattel mortgages, whereby the beneficent provisions of the statute of Elizabeth, protective of creditors, and which is now, in substance, embodied in said section 2837 of the Compiled Laws of Utah, are in part modified or repealed.

That the rule of interpretation applied, by the Courts, to such statutes, so permitting assignments, mortgages, &c., of chattels, without delivery of possession, is that such statutes are strictly construed, can hardly be successfully controverted.

In the early history of this Court, in Hamilton *v.* Russell (1 Cranch, 309), this Court held that "an absolute bill of sale of goods is fraudulent as to creditors unless possession accompanies and follows the deed; that the want of possession is not merely evidence of fraud, but is a circumstance *per se* which makes the transaction fraudulent in point of law."

And in cases of absolute deeds of assignment, that

case has been followed in a multitude of cases since, as in—

Moore *v.* Ringgold, 3 Cranch, C. C., 433.
Travers *v.* Ramsey, 3 Cranch, C. C., 354.
Meeker *et al. v.* Wilson, 1 Gallison, 423, and cases cited in note.
Bank *v.* Hunt, 11 Wallace, 391–395.

But where the deed provides for retention of possession by the assignor or vendor, there the rule has, by this Court, been held to be that such retention of possession is simply evidence of fraud, and is not conclusive.

Conrad *v.* Atlantic Insurance Co., 1 Peters, 386, 449.
De Wolf *v.* Harris, 4 Mason, 515.
U. S. *v.* Hooe, 3 Cr., 88.
Brooks *v.* Marbury, 11 Wht., 78.
Warner *v.* Norton, 20 H., 456.
Bank *v.* Bates, 120 U. S., 561, and cases cited.

These and numerous other decisions by this and other Courts are not always reconcilable as to some points; but all agree, in substance, that the statute of Elizabeth, and statutes like said section 2837 of the Compiled Laws of Utah, are really in affirmance of the principles of the common law, and are within the rule which this Court states in Shaw *v.* Railroad Co., 101 U. S., 565, where the Court say:

"No statute is to be construed as altering the common law further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

Endlich on the Interpretation of Statutes, section 127, speaking of the rule applicable to construction of statutes in derogation of the common law, states as follows:

"But in this country the rule has assumed the form of a *dogma* that all statutes in derogation of the common law, or out of the course of the common law, are strictly construed."

To which the author cites a multitude of cases, amongst others—

3 Dallas, 365; 101 U. S., 557; 21 N. Y., 148; 48 *id.*, 486; 4 Mass., 471; 15 Mass., 205; 9 Pick., 496; 13 Pick., 284; 3 Allen, 127; 9 Ill., 20; 23 N. J., 33; 54 Pa. St., 192; *id.*, 230; 2 Cal., 60; 2 Mich., 486; 46 Me., 377; 10 Minn., 386; 8 Md., 25; 10 *id.*, 129; 41 Mo., 400.

Rule of Interpretation Applicable to Chattel Mortgage Statutes.

But we now turn to some other cases bearing more directly upon the construction of chattel mortgage statutes changing the aforesaid principles of the common law regarding change of possession.

In the case of Gassener *v.* Peterson *et al.*, decided 1863, Supreme Court of California (23 Cal., 299), the suit was for the foreclosure of a chattel mortgage securing $824 purchase-money for two billiard tables, executed by Peterson to Gassener, the plaintiff.

The mortgage did not set out the rate of interest to be paid on the secured debt, or where the mortgage debt was payable, but *in all other respects* complied with the requirements of the chattel mortgage act of California of 1857, as amended in 1861 (Stats. of 1861, p. 197).

The 17th section of the Statute of Frauds of California provided:

"No mortgage of personal property, hereafter made, shall be valid against any other person than the parties thereto unless the possession of the mortgaged property be delivered to and retained by the mortgagee."

This continued to be the law respecting chattel mortgage until 1857, when a relaxation was made of certain furniture in boarding houses, &c., not material here to be noticed.

The first section of an act amendatory of the chattel mortgage law, passed in 1861, provided that no mortgage made by virtue of this act shall have any legal effect or force (except between the parties thereto) unless the residences of the mortgagor and the mortgagee, their profession, trade, or occupation, the sum to be secured, the rate of interest to be paid, when and where payable, shall be set out in the mortgage; and the mortgagor and mortgagee shall make affidavit that the mortgage is *bona fide* and made without any design to defraud or delay creditors, which affidavit shall be attached to the mortgage.

Section 3 provided that no chattel mortgage shall be valid (except between parties thereto) unless the same shall have been made, executed, and recorded in conformity with the provisions of this act.

Touching the validity of said mortgage on the billiard tables, the Court says (pp. 300–301):

"These provisions are plain, simple, and most imperative in their terms. The privilege of holding a lien on certain kinds of personal property in the *possession of the mortgagor*, is accorded to the mortgagee in certain cases *upon the performance of certain conditions.* These conditions are few and easily performed, and there need be no difficulty with ordinary care in fully complying with them. They are made *essential* to the validity of the mortgage. *The Courts have no right, no power, to extend the statute by construction so as to include property not mentioned in it, or to dispense with any of the conditions the Legislature has seen fit to impose. If we should once begin and attempt to relieve parties in cases of hardship, the law would be in danger of being frittered away, and its benefits entirely lost to the community.* The present case is perhaps one of hardship upon the plaintiff, but it is a consequence of his own oversight and neglect. Statutes of a similar character in other States have been so construed as to hold the parties to a strict performance of the conditions on which the validity of the mortgage depends."

The same thing in substance is in—

Chenyworth *v.* Dill, 7 Ind., 284.
Diver *v.* McLoughlin, 2 Wendell, 596.
Colbourn *v.* Hill, 1 Wash., 177.
Myer *v.* Gorham, 5 Cal., 322.

In Porter *v.* Dement (35 Ill., 479), a mortgagee of a chattel mortgage had lost the original, and caused a *certified copy* thereof to be recorded as required by the statute, and asked that *that* record should be treated the same as if the original had been recorded. The Court held that this could be allowed; *that the statute in regard to chattel mortgage is one in derogation of the common law, and must be strictly construed and followed.*

In Porter *v.* Parmley (52 N. Y., 185), a mortgagor of chattels retained possession, and the statute in such cases required that he must *refile his mortgage within a year, otherwise it shall* cease to be valid. (Laws, 1883, p. 403, section 3.)

The Court, in that case, held what is expressed in the headnote thus:

"A mortgagee of chattels to uphold his title, as against creditors of the mortgagor, if the property remains in the latter's possession, must refile his mortgage within the year as required by the provisions of the act requiring mortgages of personal property to be filed, although default has been made in payment. Until reduced to possession the mortgagee's claim to the property is founded solely upon the mortgage, and it ceases to be valid against the creditors if not refiled as directed."

The Court cites, in support of this proposition, amongst others, Ely *v.* Cranley, 19 N. Y., 496.

There the Court insists upon the precise rule we here insist upon, namely, that after the time when the statute declares the mortgage shall cease to be valid, there, as between mortgagee and creditors, the mortgagee must

take possession in order to keep alive his rights under the chattel mortgage, assignment, or sale.

The Court, page 189, says:

"If the possession had been changed—if the mortgagee had taken actual and continued possession—then there would be no occasion for refiling thereafter as the purpose of the statute was already accomplished."

The Court accordingly, in that case, held what the headnote further expresses thus:

"Where a firm of which the mortgagor is a member is in the use of the mortgaged chattels, an agreement between the mortgagor and mortgagee, after default in payment, that a partner of the former shall retain possession of the property *for the latter*, the property remaining and being used as before, *does not work a change of possession*. Mere words will not effect a change in law where there is none in fact.

"A sale upon execution of all the right, title, and interest of the judgment debtor in chattels covered by a mortgage void as to creditors, is a sale of all that is vendable upon the execution, and gives the purchaser all the creditor's rights against the mortgagee."

In Cook *v.* Hager, 3 Col., 386, the Court lays down the same doctrine, and states (p. 389):

"A statute authorizing chattel mortgages is in derogation of the common law, and must, therefore, be strictly construed. A mortgage to be valid must be executed, acknowledged and recorded in conformity with the statute."

In Green *et al. v.* Chandler, 5 Col., 21, syllabus states as follows:

"1. Chattel mortgage act, upon compliance with which the mortgagor may retain possession of the property mortgaged, is in derogation of the common law, and must be *strictly construed* to be valid as against third persons. *No* provision of the act can be neglected.

"2. Section 10, p. 124, General Laws, does not dispense with the requisites to the validity of a chattel mortgage, except the recording thereof when the adverse party has actual notice. Without an acknowledgment or memorandum, a chattel mortgage may be valid as between the parties, but it has no effect upon the rights of third parties acting in good faith."

In McDowell *et al. v.* Stewart, 83 Ill., 538, Court held that—

"A chattel mortgage as between parties is valid without any acknowledgment; but without the acknowledgment it has no effect upon the right of third parties acting in good faith; *and notice of such a mortgage does not prevent a creditor from subjecting property to the payment of his debt.*"

In the body of the opinion, page 540, after stating the rule as just quoted from syllabus, and after citing Porter *v.* Dement, 35 Ill., 478, Court proceeds:

"In such case, *actual notice of the mortgage does not prevent the creditor from asserting his right to subject the property to the payment of his debt,*" citing:

Frank *v.* Minor, 50 Ill., 544.
Ferris *v.* Tinkham, 29 Ill., 141.
Van Pelt *v.* Knight, 19 Ill., 535.
Sage *v.* Browning, 51 Ill., 217.

Court proceeds:

"There is no want of good faith on the part of the creditor in levying upon his debtor's property, included in a chattel mortgage which the law declares void as to him."

Jones on Chattel Mortgages, sec. 248, states the rule in regard to the effect upon a creditor of his having notice of the existence of a chattel mortgage not dealt with according to the statute, thus:

"A mortgage not executed or acknowledged in conformity with the statute, *although spread upon the record, is not notice to creditors or purchasers.*"

In the following cases it was held that the mortgagee must take possession, within a reasonable time after default in payment of the debt secured by the mortgage; and that when possession remains with the mortgagor until default under a provision to that effect in the deed, if the possession be not then taken, the mortgage, after such default, is regarded as fraudulent:

Leaman *v.* Eager, 16 O. S. R., 209.
Hanford *v.* Obrecht, 49 Ill., 146.
Wilder *v.* Crane, 53 Ill., 490.
Leman *v.* Robinson, 59 Ill., 115.
Burnheim *v.* Muller, 61 Ill., 453.
Reese *v.* Mitchell, 41 Md., 365–370.
Barbour *v.* White, 37 Ill., 164.
Arnold *v.* Stock, 81 Ill., 407.
Reed *v.* Eames, 19 Ill., 594.
Dunlap *v.* Epler, 88 Ill., 82.
Travis *v.* McCormick, 1 Wis., 148.
Chapin *v.* Whitsett, 3 Col., 315.

All these cases proceed upon the general principle that where possession is allowed to remain in the mortgagor after condition broken, it becomes a fraud against persons subsequently dealing with the mortgagor. But in the case at bar *it is the effect of the statute itself that renders the lien void after the expiration of ninety days from the maturity of the mortgage debt; and we are not, therefore, here dependent upon any general principles of law in maintaining the expiration of the lien at the end of ninety days.*

Although these authorities might be indefinitely increased, going to the point that statutes tolerating chattel mortgages where a change of possession does not occur, are strictly construed and never extended beyond the letter of the statute; yet we refrain from further citation because deemed unnecessary.

Effect of Notice of Mortgage.

We next turn to the point so prominently relied on in the Court below that because appellants had actual notice of said chattel mortgage, and of said alleged rights of appellee thereunder; therefore, such notice avoids the effect of the levy and purchase thereunder.

The authorities already cited negative this proposition, and to these we add the following additional ones, holding that creditors may purchase property, in the possession of the mortgagor, even if they have full notice of a chattel mortgage which has not been dealt with according to the requirements of the statute, or which, under the provisions of the statute, has ceased to be a lien.

If the mortgage in this case ceased to be a lien at the end of the ninety days, then it is self-evident that, so far as the question of the effect of knowledge, on the part of the creditor, of its existence is concerned, then such expired mortgage stands on the same footing as mortgages never recorded, or where recorded, not conforming, in their contents or execution, to the requirements of the chattel mortgage law.

It is settled law that actual knowledge of the existence of an imperfect or an unrecorded chattel mortgage does not prevent a valid levy, &c., by or on behalf of the party having such knowledge.

Some of the cases to this effect we now refer to.

It is so held in—

Travis *v.* Bishop, 13 Met., 304.
Shapley *v.* Wentworth, 13 Met., 362.
Bingham *v.* Jorden, 1 Allen, 374.

In section 314, Jones on Chattel Mortgages, the author cites some of the authorities to the effect that, under statutes making unrecorded mortgages void against persons other than parties to it, although they have actual knowledge of the mortgage, and such notice to a creditor

would not debar him from taking such property on execution.

This last proposition in support of the right creditors to attach property which they know to be subject to a chattel mortgage not made, or not dealt with, according to the requirements of the statute, we refer to the following additional cases—

Porter *v.* Dement, 35 Ill., 478.
Sage *v.* Browning, 51 Ill., 217.
Forest *v.* Tickham, 29 Ill., 141.
Gregg *v.* Sanford, 24 Ill., 17.
Henderson *v.* Morgan, 26 Ill., 431.
Sheldon *v.* Connor, 48 Maine, 584.
Richards *v.* Roberts, 48 Maine, 548.
Beavans *v.* Bolton, 31 Mo., 437.
Bryson *v.* Penix, 18 Mo., 13.
Harvey *v.* Crain, 2 Biss., 496.
Selking *v.* Hebel, 1 Mo. App., 304.
Herriford *v.* Davis, 102 U. S. R., 235.
Harkness *v.* Russel, 118 U. S. R., 680.

The statute brought into notice in the case of Sheldon *v.* Connor, 48 Maine, *supra*, is found in the Revised Statutes, 1841, Sec. 32, and provides, that no mortgage of personal property made since April 24, 1839, or that shall be hereafter made, etc., shall be valid against any others than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage has been or shall be recorded by the clerk of the town where the mortgagor resides.

Of this statute the Court (p. 586) says:

"This provision is *imperative* in its terms, and if it was really designed that it should have a construction even more enlarged than that for recording deeds of real estate, it is very remarkable that such unequivocal lan-

guage should be employed touching the record of one and not the other."

There the Court held what is stated in the headnote as follows:

"The statute requiring the mortgage of personal property to be recorded to render it valid *makes no exception;* and one subsequently purchasing or attaching the property will not be affected by an unrecorded mortgage, *notwithstanding he had actual notice of it.*"

Same thing is decided in Rich *v.* Roberts, 48 Maine, 548; also in Beavans *v.* Bolton, 31 Mo., 437.

EFFECT OF LIS PENDENS.

This brings us to the matter which constitutes the main reliance, in the Court below, of the appellee, to wit, to appellee's proposition, asserting that though the said section 2805 of the Compiled Laws taken by itself, and viewed independently of the *lis pendens*, would render the chattel mortgage invalid after the expiration of said ninety days named in said section, yet the commencement of a suit to foreclose has the effect of prolonging the duration of said mortgage lien indefinitely, and up to the end of the law suit commenced to foreclose.

To this position of appellee there are, as seems to us, many and quite conclusive replies.

We state some of these as follows:

1. We have seen that the statute expressly *limits* the validity of the chattel mortgage to the expiration of said ninety days, and it makes no exception whatever.

We have, also, seen that statutes giving validity to chattel mortgages in derogation of the common-law rights of creditors are strictly construed.

But, whilst this is incontrovertible law, yet the appellee's position adds to this statute a condition which is not only

not in the statute, but is, in legal effect, expressly prohibited by it, namely, a condition which says that the statute shall be so read that the said lien, which the statute terminates at the end of ninety days, shall continue indefinitely after the expiration of the said ninety days, provided suit to foreclose is commenced within said ninety days.

This addition of said conditions named in said section 2805 is simply *legislation*, and is not interpretation.

2. The *lis pendens* accomplished by the commencement of said foreclosure suit is, *at most*, only a *notice* to, and an obligation upon, appellant, as purchaser *pendente lite*, which binds him to abide by whatever *rights* such suit shall finally adjudge to the complainant therein, as being held by him in the subject-matter of the suit so pending when the purchase was made.

Or, stating the matter in the words of this Court, as found in Warren County *v.* Marcy, 97 U. S., 96–106, where this Court, quoting from Chancellor Kent (Kent's language as found in the very cases relied on in the Court below, Rec., 125) states that—

> "*Lis pendens*, duly prosecuted and not collusive, is *notice* to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after bill filled."

This *lis pendens* is, therefore, notice. But notice of what? Is it notice of rights which the complainant in the *lis pendens* asserted that he had, but which he did not have, and which the Court below did not finally adjudge to him? Of course, it is not such.

It is simply notice of such rights in the subject-matter of the suit as really did exist at the time of appellant's purchase of these chattels, as such rights shall be ultimately adjudged in this now pending appeal in this Court.

The *lis pendens*, therefore, does not *change* or *add to* the character or duration of the lien created by the chattel mortgage. It simply brings into Court the question, what is the duration of the chattel-mortgage lien, as that duration is defined by the statute?

To illustrate what is here meant: Suppose a mortgage is given to one of his creditors by the owner of a mining claim upon his mining-claim right; and suppose that the mortgagee of the mining claim commences a suit to foreclose the mortgage on the mining claim, and that, at the time of the commencement of the suit, the mining claim is valid because the statutory amount of work, and other statutory conditions attached to the mining claim, have then been performed.

There the thing covered by the mortgage is a mining claim, liable to be lost by failure, thereafter, to observe the statutory conditions attached by the law as a condition to the *continuance* of the mining claim.

Suppose, now, that after the commencement of this suit to foreclose the mortgage, the conditions are *not* performed, surely the pendency of the suit would not keep alive the mining claim in case of such default.

So precisely in the present case, section 2837, taken along with section 2805, expressly ordain that a chattel mortgage, without possession taken by the mortgagee, shall be forfeited at the end of ninety days from the maturity of the claim secured by the mortgage.

They make the *taking possession*, and nothing else or less than that, of the mortgaged property to be requisite in order to continue the duration of the lien beyond said ninety days. Therefore, they make this taking of possession, by the mortgagee, as much a condition to the continued duration of the mortgage lien after the ninety days as the doing of the work on a mining claim is made requisite, by the statute, in order to keep it alive.

Therefore, the commencement of a suit to foreclose,

within the ninety days, at most, only gives notice to the purchaser at the sale that the complainant in the foreclosure suit has a lien that will continue up to the foreclosure decree, *provided the complainant takes possession of the chattel property before the expiration of said lien, and before any rights of creditors attach in the property in virtue of levy made after the expiration of ninety days and before possession by mortgagee.*

This seems to us to be so incontestably plain as to make elaborate discussion of the point difficult if not improper.

The result, therefore, is this: that since the mortgagee did not take possession within the ninety days, he did not perform the indispensable condition under which he could continue the existence of his mortgage lien after the expiration of the ninety days. He had a perfect right to commence his foreclosure suit; and had he taken possession within the ninety days, and before the levy, his *lis pendens* would have been conclusive against appellant. But he did no such thing as take possession. Therefore, his *lis pendens* has accomplished nothing for him in the way of excusing his taking possession of the property.

And the question is left for the decision of this Court whether such *taking possession* is, indeed, by the statute made to be a condition precedent to the continuance of the mortgage lien after ninety days.

That, therefore, presents to this Court the question whether the commencement of the suit is, by the statute, made to be a *substitute* for that *change of possession* to the mortgagee which sections 2837 and 2805 require, in express terms, in order to a lien being continued beyond the said ninety days?

That it is the *visible* and *overt* act of actual change of possession from mortgagor to mortgagee—from vendor to vendee, or from assignor to assignee—which the Statute of Frauds of all the States, and of Elizabeth, make to be

essential to the validity, as against creditors, of the transfer, cannot, we think, be reasonably be disputed.

See this abundantly established by the cases cited in the notes to section 253, Wait on Fraudulent Conveyances (2d Ed.)

Indeed, the very foundation of the rule of law embodied in such sections as said 2805 and 2837 (and which are substantially alike in most of the States) is, that the leaving of actual visible possession with the vendor or mortgagor tends to promote fraud, and hence the requirement that there shall be a *visible transfer of possession.* Hence it is that the decisions so steadily hold that mere constructive change of possession will not satisfy the requirements of these Statutes of Fraud.

In subjection to this controlling design and foundation of the Statute of Frauds, Lord Ellenborough states, in Wardelle *v.* Smith, 1 Campbell, 332, that "in order to defeat an execution by a bill of sale there must appear to have been a *bona fide* substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colorable only. There must be an exclusive possession under the assignment or it is fraudulent and void as against creditors."

Same rule, in principle, is found stated in the case above cited of Ely *v.* Cranley, 19 N. Y., 496.

Same thing found in Doyle *v.* Stevens, 4 Michigan, 87; in Doak *v.* Brubaker, 1 Nevada, 218; and Bank *v.* Bates, 120 U. S., 560.

See, also, Jones on Chattel Mortgages, sec. 395, and cases cited; Menzies *v.* Todd, 19 Wis., 343; Porter *v.* Parmely, 52 N. Y., 185; and Wright *v.* Tetlow, 99 Mass., 402.

Again, to allow the mere commencement of a law suit by a vendee or mortgagee, commenced for the purpose of

foreclosing the mortgage, to be a *substitute* for that "*open visible, and substantial* change of possession" (120 U. S., 560) from the vendor or mortgagor to the vendee or mortgagee, is, manifestly, to *abolish the very foundations on which this provision of the Statute of Frauds, requiring change of possession, is based.*

Mitchell *v.* Black, 6 Gray, 105, strongly illustrates this rule making actual change of possession *before* attachment or levy indispensable in order to defeat the creditor.

The quiet, silent, and, to the great public, invisible commencement of such foreclosure suit in the Court has scarcely a *tendency*, much less the *effect*, to give that notice, to the public, of the change of ownership which a visible change of possession of the property gives to persons dealing with the debtor.

A law suit, to foreclose generally by necessity, and sometimes by collusion between the complainant and defendant, is made to be a thing of indefinite months, and sometimes, years of duration; and if the insolvent debtor's property is to be allowed to remain in his possession during these years of litigation, and if he is thus to be given, by the mortgagee, the credit which continued possession of the mortgaged property tends to give him, then, so far as the Statute of Frauds relates to change of possession, such a holding repeals that statute almost totally.

Again, in this connection, it must be carefully kept in mind that if a chattel-mortgage law, which, taken in connection with section 2837, says that, in the absence of a change of possession of the mortgaged property, the mortgage lien cannot endure beyond ninety days after the maturity of the mortgage debt, is to be construed as *not meaning what it says*, and as tolerating a continued possession, by the mortgagor, during the years of litigation for foreclosure, and to tolerate his continued holding

of a lien, during those years, in favor of the mortgagee who has thus suffered his debtor to retain possession, and to thus obtain credit, then the chattel-mortgage law becomes and is *a snare* to the public, which is exceedingly well calculated to deceive them into giving credit to the insolvent.

Instead of such being the operation of these chattel-mortgage acts, their design is to make it safe for purchasers and creditors to deal with the mortgaged property, when found in the possession of the mortgagor after the expiration of the ninety days, as free from the mortgage lien.

Such is the literal, express, and unambiguous language of these facts, to wit, the facts of the existence and provisions of the chattel-mortgage law, making the lien to cease at the end of ninety days, and the fact that possession of the mortgaged property, after that expiration, is still with the mortgagor.

These facts make an invitation to the public, as we have just remarked, to deal with the mortgagor and his property as *divested* of the mortgage lien; and, hence, instead of knowledge of the existence of the mortgage and of its age and its record being notice to the creditors *not* to deal with the property as that of the mortgagor, it is notice of the very reverse. It is notice that the ninety days have expired; that the possession is unchanged, and that the mortgage is *dead*.

Again, we submit that, in principle, and legal effect what we have just been stating, as to the necessity of a change of possession from mortgagor to mortgagee (except as the chattel-mortgage law expressly dispenses with the necessity for such change), is in accordance with the holding of this Court in the case of Wood *v.* Weimer, 104 U. S., 786.

In that case the continuing validity of a chattel mortgage was brought into question where the statute, which controlled the question of validity, declared that such

mortgages were void where the mortgagor retained possession, unless the mortgage was recorded; and further provided that the mortgage should, at the end of one year from its recording, cease to be a valid lien on the property, as against creditors and subsequent purchasers in good faith, unless, within thirty days *before* the expiration of said year, the mortgagee should annex to the mortgage on file an affidavit showing the then extent and character of his interest under the mortgage (p. 794).

In that case Wood, the mortgagee, took and filed, on May 25, 1875, the chattel mortgage in question (p. 787). Weimer, the defendant and the attaching creditor, attached this mortgaged property July 15, 1875 (p. 790). Wood, the mortgagee, demanded possession of the property, and obtained possession thereof by replevin, October 11, 1875, *long before the expiration of a year from the recording of said mortgage.*

Under this state of facts, it was strenuously contended, by the attaching creditor, that the mortgage lien was lost after the commencement of the suit in replevin, because of the failure of the mortgagee, Wood, to comply with the requirement of the statute as to attaching an affidavit to the mortgage *within thirty days before the expiration of the said year.*

In rejecting this contention of Wimer, the Court (after reciting the above provisions of the chattel mortgage law, and the above facts regarding the making and filing of the mortgage, the proceedings in attachment, &c.) bases the rejection of that contention *on the single fact that, before the expiration of the year, and by means of a replevin, the mortgagee, Wood, had changed the possession of the property from Weimer to himself, and thus had taken the property out of said provisions of the chattel-mortgage law.*

This, the Court does in the following words (p. 794):

"It is also claimed that the lien of the mortgage was

lost *after the suit was begun*, because of a failure to comply with the requirements of the recording acts. These acts prescribe that where mortgages of chattels are not *accompanied by immediate delivery, and followed by an actual and continued change of possession*, they shall be void as against creditors and subsequent purchasers in good faith, unless copies are filed in the proper office. Another provision is that every such mortgage shall *cease* to be valid as against creditors and subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing, *unless* within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney, shall annex to the instrument on file an affidavit setting forth the interest which the mortgagee has, by virtue of his mortgage, in the property mortgaged. The goods, in this case, *were replevied before the year expired, and while the mortgage was in full force under the recording acts. The possession of the property was then taken by Wood. After that the recording acts did not apply, unless the property was again put into possession of the mortgagor.* Nothing of this kind appears in the findings, and the presumptions are all the other way."

In thus basing its refusal to hold that said mortgage lien has ceased at the end of the year, upon the fact, *alone*, that, through the replevin suit, the mortgagee had taken possession of the property before the expiration of the year, this Court, in effect, declares that, had not such possession been taken within the year, the mortgage lien would, under the operation of said chattel-mortgage law, have expired at the end of said year—this notwithstanding the pendency of *any* suit which did not in fact so change the possession from mortgagor to mortgagee.

Cases Cited in Court Below.

The Court below cited but two cases in support of the proposition that the mere commencement of the foreclosure suit, without any actual taking of possession, was equivalent to a change of possession.

These two cases are Thompson *v.* Van Vechten, 5 Abb. Prac. Rep., 458, and Otis *v.* Sill, 8 Barbour, 102.

It is important to state, in reply to the use made below (Rec., 125) of the case of Thompson *v.* Van Vechten (5 Abb. Prac. Rep., 458), that that case was appealed to the Court of Appeals (27 N. Y., 568), and that it appears by the opinion of Denio, C. J., delivered in deciding the appeal, that the Court of Appeals, so far from affirming what is quoted at folio 275 of the record, from the decision in 5 Abb., about the "measures" taken, on June 28, 1854, to foreclose the mortgage on the vessel "Alida," *being equivalent to a taking of possession of the mortgaged property*, and, therefore, acts which kept the mortgage alive, held, on the contrary, that said "measures" so taken were an attempt, by the party owning the mortgage debt, to defraud the holders of junior liens on the vessel, and that the "measures" so taken had, instead of keeping the mortgage alive, *extinguished it.*

Besides, the same opinion shows (27 N. Y., 580) that, at the time (June 28, 1854) when said measures to foreclose are said to have been taken, which are said to be "equivalent" to taking possession of the vessel, that vessel *had already, on the 4th of May, 1854, passed into the actual possession of the sheriff by levy thereon*, and hence all that was said about said "measures" being equivalent to possession taken, is, at most, mere dictum.

Besides all this, this case is one strongly asserting the doctrine we here insist upon as that applicable to the interpretation of chattel mortgage statutes which prescribe the conditions on which a mortgagor may, as against creditors, retain possession of the mortgaged property. The Court made the mortgage which was not *refiled* as required by section three of the act of 1833, c. 279, to be void as to *all creditors without regard to the time when the debt was contracted* (*27 N. Y., 583*).

As to the other case, so cited below, of Otis *v.* Sill, 8

Barbour, *supra*, we have to say that the Court below (Rec., 226), quotes from the opinion what is set forth on that page, stopping the quotation at the words "filing of the mortgage." The next sentence in the opinion (8 Barbour, 102), is important to be added, and is in these words:

"In my opinion the charge of the justice that *if the plaintiff took possession of the property on the 16th of October, 1848, his omission to refile the mortgage did not affect its validity.*"

This omitted sentence, just quoted, is a statement of what Justice Gray, in the circuit had below given in his charge to the jury, namely, that if the plaintiff *took possession* of the property on the 16th of October, 1848, his omission to refile the mortgage did not affect its validity.

The only question before the Court was whether this charge in these last quoted words was right; and the only thing decided by the Court was that it was right. The Court carefully and *expressly* stated to the jury that *actual possession* of the goods must have been taken, and the Court left it to the jury to decide whether such *actual* possession was taken. *The facts proved were that the plaintiff did take actual possession by sending his clerk to the goods and taking possession thereof for the purpose of making an inventory; that he (the clerk) did, thus in possession, make an inventory, and did thereupon advertise them for sale. Whether this was an actual taking of possession within said instruction to the jury was the question of fact which the Court left to the jury; and the jury found that it was an actual taking of possession.*

Instead of this being an authority for the proposition that the mere *commencement of a suit*, without attaching or going near to the property in question is a taking of possession, it is, we submit, an authority directly to the reverse.

Taking Possession.

Another point we understand to have been made below, which we briefly notice.

It is, that it would be unreasonable and absurd to make the taking possession by the mortgagee of the mortgaged property a condition precedent to the continuance of his mortgage lien after said ninety days, because such possession might be *refused* by the mortgagor, and mortgagee would thus be placed at the mercy of his mortgagor; and, also, besides that said section 3460 does not allow, in cases of mortgage, any other action than the one to foreclose prescribed by that section.

To this position there seems to us to be several sufficient replies. One is that the chattel mortgage in this case (Rec., 4, fol. 8) *expressly* authorizes the mortgagee to take possession of the property whenever he deems it necessary. And it seems to be quite impossible to maintain that this express contract-right of taking possession is *meant* to be destroyed by said section 3460, and is meant to leave the party remediless as to the enforcement of said contract-right of taking possession. A foreclosure suit is often quite inadequate for the furnishing of that kind and degree of protection which is furnished by the *actual taking of possession of the mortgaged property;* and, besides, this mortgage expressly stipulates for the benefits of *both* possession *and* foreclosure sale (Rec., 4, fol. 8). A statute which undertook to deprive a party of all remedy, whether by replevin or otherwise, upon this contract-right of possession would hardly, we submit, be construed as valid legislation; but if valid, no statute would ever receive so monstrous a construction unless it is forced upon the Court by explicit, mandatory, and unmistakable terms. Section 3460, we submit, admits of no such construction.

That it admits of no such construction, is, besides, indicated by the following authorities:

Jones on Chattel Mortgages, sec. 706.
Lacey *v.* Gobeny, 36 Mo., 323.
Cleaves *v.* Harper. 61 Ill., 126.
Barbour *v.* White, 37 Ill., 164.
Wood *v.* Weimer, 104 U. S., and—
Locomotive Works *v.* Harvey, 93 U. S., 672.

Again, suppose that replevin is prohibited by said section 3460, still, even in that case, we submit, that the excuse for not taking possession is here unavailable. This is apparent by the considerations following. The duty to assume possession which the law imposes upon a vendee, assignee, or mortgagee under conditions and statutes such as we here deal with, is one founded upon a *public policy*, in the interest of commerce, which has stood unchanged and unchallenged for centuries. It is designed to protect creditors and purchasers. Assumption of possession is, therefore, by the law made to be a *duty*, and not a mere matter of *option*, as between the mortgagee and the creditors of the mortgagor. He cannot, therefore, do as he pleases about taking possession, as between him and creditors. The law imposes a penalty upon the mortgagee for not taking possession at the time when the statute says he shall take possession or else lose his lien, as between him and such creditors.

This being, obviously, the principle upon which all such statutes as that of 13th of Elizabeth, and said section 2805, are based, it will not do for a mortgagee holding such a right and physical power to take possession, or at least to endeavor to take possession, to come into a court of equity and say, as against a judgment creditor of the mortagor, that he, the mortgagee, had no right of action for immediate possession in the Court by virtue of the writ of replevin, and, therefore, he omitted to make *demand* of possession or take any steps to that end.

Again, it is to be observed, regarding the point as to

what power the appellee had to take possession within the ninety days, that such power of taking possession was absolute and wholly independent of any objection made by the mortgagor. Precisely this is decided in the case of Mitchell *et al. v.* Black *et al.*, 6 Gray, 103, 104, in a case in all material respects analagous to the present. It was a case where the assignee or mortgagee held an instrument by which the mortgagor gave him the right to take possession; and touching that right, the Court uses the following language:

"This taking possession of the property at that time by the defendants was strictly an act of their own, under the right which they previously acquired; and no consent, assistance, or co-operation of Perry and Mayo was necessary to authorize or justify it.

Conclusion.

We do not deem it necessary further to protract this presentation of the points for appellant in this case. All that we have not *specifically* noticed are, in principle, covered by the considerations which we have gone over. The rulings in regard to the admission and rejection of evidence are covered by the propositions (and the authorities in support thereof), which assert that notice, to the appellants, of the existence of the mortgage, and notice of the alleged rights of the mortgagee as secured by the mortgage, and all other matters of that kind, became, and were, totally *immaterial* in the case, owing to the fact that the mortgage *expired on the 12th of August, 1885*, and became, as between appellant and appellee, as if it had never existed; and that all evidence in regard to such mortgage, and of the debt it secured, and their effects, become immaterial, and, therefore, incompetent.

Any discussion, in detail, in regard to these points which may be required (if any), will be submitted in the oral argument for the appellants.

Samuel Shellabarger and
Jeremiah M. Wilson,
Attorneys for Appellants.

[redacted]

[redacted]

[redacted]

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 328.

JOHN BROOM and E. A. WHITAKER, Appellants,

vs.

JAMES C. ARMSTRONG.

BRIEF OF H. W. SMITH, *of Counsel for Appellee.*

On January 14, 1885, Mills H. Beardsley made a chattel mortgage to James C. Armstrong on the property mentioned in the pleadings, being the furniture and fixtures of the Broom Hotel, in Ogden, Weber County, Utah, and on the same date Beardsley gave his promissory note to Armstrong (secured by the said mortgage) for $8,000, payable May 14, 1885.

This mortgage was made and recorded in conformity with the statute law of Utah Territory concerning chattel mortgages (Session Laws of Utah, 1884, pp. 28–31). There being no question made as to this, I do not quote the statute entire.

On the 22d day of July, 1885, plaintiff below, Armstrong, filed his original complaint against Beardsley to foreclose said mortgage in accordance with section 9 of the statute, concerning chattel mortgages, p. 30, Utah Laws of 1884, which provides that "An action for the foreclosure of a mortgage on personal property, *or the enforcement of any lien thereon* of whatever nature, *may* be commenced, conducted, and concluded in the same manner as provided by law for the foreclosure of a mortgage or lien on real property, etc. The plaintiff proceeded under this section within the ninety days provided by statute for the lien to run. Indeed,

the said ninety days did not expire till a time when the court was adjourned over for the summer vacation.

The plaintiff proceeded, under this section, in exact analogy to the law and practice respecting the foreclosure of liens on real estate—even to the filing and recording of *lis pendens* as provided by statute in cases affecting real estate.

Section 266 of Utah Code of Civil Procedure, Laws of 1884, p. 200. This section is as follows:

"In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file for record, with the county recorder of the county in which the property, or some part thereof, is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defence, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

See undenied averment in the amended and supplemental complaint as to the *lis pendens*, p. 10 of printed record, bottom of page.

The prayer of the original complaint was for judgment for amount to be found due on the note secured by the chattel mortgage; for the usual decree for the sale of the mortgaged chattels according to the law and the practice of the court. * * * That the proceeds of the sale might be applied in payment of the amount due to plaintiff; that the defendant, Beardsley, and all persons claiming under him subsequent to the execution of said mortgage, either as purchaser or otherwise, might be barred and foreclosed of all right of redemption; and that plaintiff might have judgment against Beardsley for any deficiency after applying the proceeds of such sale to the satisfaction of plaintiff's judgment and for a *receiver, and for general relief.*

To the complaint was attached, and made a part thereof, a copy of the mortgage with the affidavits attached (being the affidavits

required by the Utah chattel mortgage statute), and also the certificate of its due recording.

No question is raised as to the formality of the execution of the mortgage nor as to its being duly recorded.

A summons was duly issued on this complaint on the 23d day of July, 1885, and served the same day on Beardsley, then the only defendant, and the summons was duly returned and filed in the clerk's office on the 30th day of July, 1885, with certificate showing due service. (See printed record, p. 6.)

Either the Utah statute relating to *lis pendens*, quoted *supra*, applies by virtue of the statutory right to forcclose a chattel mortgage as a real estate mortgage, or the general doctrine of the law of *lis pendens* applies in respect to personal property. Bennett on *Lis Pendens*, sections 81 to 86, shows that *lis pendens* applies to personal as well as real estate. The author reviews or cites, among others, the following cases:

Hadden Impl., etc., *vs.* Sprader, *et al.*, 20 Johns. R., 553.
Taylor *vs.* Jones, 2 Atk., 600.
Hoen *vs.* Hoen, 1 Ambler, 79.
Patridge *vs.* Gopp, 1 Ambler, 596.
Scott *vs.* Scholey, 8 East., 435.
Edmonston *vs.* Lyne, 1 Paige, Ch. R., 640.
Caruney, *et al.*, *vs.* White, 2 Paige, Ch. R., 567.
Farnham *vs.* Campbell, 10 Paige, Ch. R., 601.
Brinkerhoff *vs.* Brown, 4 Johns. Ch., 671.
Leitch *vs.* Wells, 48 Barbour, 649.
Blake *vs* Bigelow, *et al.*, 5 Ga., 430.
The Bank of the United States *vs.* Burke, *et al.*, 4 Blacthf., 144.
Bolling *vs.* Carter, *et al.*, 9 Ala., 921.
Acriff *vs.* Price, *et al.*, 3 Head., 296.

I copy a note to section 81, p. 139 of Bennett on *Lis Pendens:*

"That *lis pendens* applies to personal property as well as real estate see Buford *vs.* N. L. Pact. Co., 3 Mo. App., 159; Bolling *vs.* Carter, 9 Ala., 921; Lewis *vs.* Meux, 1 Strobh. Eq., 182; Scott *vs.* McMillen, 1 Litt., 309; Edgell *vs.* Haywood, 3 Atk., 357; Watson *vs.* Wilson, 2 Dana, 413; Scudder *vs.* Van Amburg, 4 Edw., 29; Newman *vs.* Chapman, 2 Rand, 93; McCutchen *vs.* Miller, 31

Miss., 88; Carr *vs.* Lewis & Co., 15 Mo. App. R., 551; Tyler *vs.* Hyde, 2 Blatchf., 308; Tabb *vs.* Williams, 4 Jones' Eq., 352; Fletcher *vs.* Ferrel, 9 Dana, 376; Diamond *vs.* Lawrence Co., 37 Pa. St., 353; Kellog *vs.* Fancher, 23 Wis., 1; McIllwrath *vs.* Hallander, 73 Mo., 112; Wills, *et al.*, *vs.* Whitmore, *et al.*, 9 Baxt., 193; Dovey's Appeal, 97 Pa. Ct., 153; Kimberling *vs.* Hartley, 1 McCrary, 136; McCauley *vs.* Rogers, 10 Bradf., 562."

Plaintiff Armstrong was diligent. It is true that there is a finding that there was a single day of court in which he might have taken a default judgment against Beardsley, he applying to the court for the relief demanded; but, for this failure, the finding is that the plaintiff had a reasonable excuse. (See printed record, p. 37; original record, p. 80.) And, besides, the ninety days statutory limitation had not then expired in which the suit might have been brought. This time did not expire till the 12th day of August, 1885.

But the plaintiff, Armstrong, did not in fact have even that one day. Sunday, August 2, was the 10th day after service of summons, and Monday, August 3, would have been rule day on which defendant, Beardsley, was to plead to the original complaint; but it was a general election day, and therefore a holiday, made so by statute, and defendant, Beardsley, had all the next day, Tuesday, the 4th day of August, in which to plead; but on that day the district court adjourned till September 21. See, for this adjournment, Exhibit B, p. 249; original record, p. 115; printed record, bottom of the page. This exhibit is in the evidence, but contains matter of which this court will take judicial notice.

I quote from the Utah statutes, laws of 1884:

"SEC. 9. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day."

Also, from Compiled Laws of Utah, 1876, p. 83, as to Monday, August 3d, being a general election day:

"SEC. 1. That annually on the first Monday of August there shall be a general election held in each precinct, in the several counties, for choosing all officers not otherwise provided for."

And also from page 164, Utah laws of 1884:

"SEC. 56. No court can be opened, nor can any judicial business be transacted on * * * any day on which a general election is held * * * except——"

The section relates to holidays, and the exceptions do not relate to the question under discussion.

Now, Beardsley had all day Tuesday, the 4th of August, on which to plead. See summons in printed record, p. 5, which contains in itself the statement that he had ten days after service in which to plead, and compute the time with the two holidays out, viz., Sunday and Monday, the general election day.

On Wednesday, the 5th of August, the only judge of the district went out of the Territory and remained absent till the 20th September, Sunday; and on the 21st September he opened court. No court had been held in the district in the meantime, nor was there any judge in the district.

The finding that plaintiff had a day in which he could have applied to the court for judgment was made because the court overlooked the fact that two holidays came together.

Considerable transpired in the vacation, the substance of which is set forth in the amended and supplemental complaint filed by leave on the 21st of September, wherein the defendants, Broom and Whitaker, were made parties defendant.

Before proceeding to state the substance of the amended and supplemental complaint, I wish to state that some point was made on the trial because a single day of court was held when the attorney for the plaintiff did not know there was to be a session of the court, and on that day the plaintiff, it is said, could have applied to the court for judgment, but this was before Judge Powers, the district judge, went east, and a full week before the expiration of the said ninety days. After that one day when it is said a default could have been taken, the plaintiff, if he had not begun his suit, might still have begun it with all his rights unimpaired, because within the ninety days' limitation, which did not expire till August 12th. But there was no such day, as shown above.

Now it is claimed that the plaintiff had some other remedy, as by replevin. As between mortgagor and mortgagee (which is

the nature of this action up to the present point of my statement of the case) I deny that there is any remedy by replevin. Section 606 of the Utah Code of Civil Procedure (Laws of 1884, p. 268) would seem to settle this matter. It is as follows:

"There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or *personal property*, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the encumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale and the amount due to the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in case of sales under execution; and if it appear from the return of the officer making the sale that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt. * * * No person holding a conveyance from or under the mortgagor of the property mortgaged or having a lien thereon, which conveyance or lien does not appear of record in the proper office, at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action."

The chapter is in regard to foreclosure. It would seem to need no argument to show that an action of claim and delivery or repleven founded on a chattel mortgage would be an action for the enforcement of a "*right secured*" by chattel mortgage, and that the section above quoted forbids such action at least between the mortgagor and mortgagee.

And the claims of Broom and Whitaker had not arisen when this action was brought.

Thus, the only course open to the plaintiff, Armstrong, under the statute law of Utah, was to prosecute his foreclosure proceedings. Under section 9 of the chattel mortgage act, quoted *supra*, plaintiff below had the right to bring and prosecute this suit, and pending this suit, under the section immediately above quoted limiting him to one action, certain it is he could not bring another.

It has been so held by the Supreme Court of Idaho under a similar statute (Cederholm *vs.* Loofborrow, *et al.*, 9 West Coast Reporter, 602). This was a case where an action to foreclose a chattel mortgage had been begun, and an action in replevin for the mortgaged property was commenced later by the same plaintiff. The court held that the second action was not authorized under the Idaho statute.

I call attention to the authorities cited in the opinion of the court in Cederholm *vs.* Loofborrow, *et al.*, *supra*, and to the case of Brown *vs.* Willis, 67 Cal., 235; Bacon *vs.* Raybould, 10 Pacific R., 481; Biddell *vs.* Brizzulara, 64 Cal., 362; Bartlett *v.* Cottle, 63 Cal., 366.

Then, since section 9 of the Utah chattel mortgage act provides that we *may* proceed by foreclosure, and section 606 of the procedure act, passed the same day, provides that we shall have no other remedy (as against the mortgagor) and since wherever such statutes have been construed in respect to a real estate mortgage, as in the California cases, and in the Idaho case in respect to a chattel mortgage, it has been held that foreclosure is the only remedy. Now, when this plaintiff, the appellee in this action, commenced his suit in foreclosure amply within the ninety days allowed by law, he did all that the law permitted him to do to enforce his lien.

Besides, replevin in Utah does not give an absolute right to possession of property without bond, which plaintiff may not be able to give, nor with bond, for his undertaking may be countervailed by another undertaking. (Utah Laws, 1884, sections 385 and 387, pp. 218 and 219.)

But, to proceed with the facts:

On the 21st of September, 1886, the amended and supplemental complaint was filed by leave, and John Broom and E. A. Whitaker made defendants. They at once entered their appearance and demurred to the amended and supplemental complaint.

That complaint is by Armstrong, plaintiff, against said Beardsley and said additional defendants, Broom and Whitaker.

It recited the making of the said note and mortgage by Beardsley, and the recording of the mortgage, and attaches the mortgages with the certificates of the affidavits, acknowledg-

ment, etc., attached; that the chattels mortgaged continued in the possession of Beardsley till August 13, 1885, when they were taken from him, as afterwards stated; that the defendants, John Broom and E. A. Whitaker, claim to have some interest in said chattels, as purchasers, mortgagees, or otherwise, which claims are subsequent to the lien of plaintiff's mortgage, and have arisen since the commencement of this action. It then recites the levy in the case of the Utah National Bank *vs.* Beardsley, on the 13th of August, 1885, and sale to Broom on the 22d of July, and mortgage by Broom to Whitaker the same day, and the insufficiency of the property to pay the plaintiff's lien is stated, and other grounds for the appointment of a receiver. It then refers to the original file in the action, and states the prayer of the original suit; states the issuing and service of the summons in the original suit, and the filing of the *lis pendens*, containing the names of the parties, to wit, Armstrong and Beardsley, and the object of the action, and a description of the property to be affected thereby.

The amended and supplemental complaint further recites that at the time of the levy of the 13th of August by the U. S. marshal, and at all times thereafter, the said marshal and said Broom and Whitaker had full notice and knowledge of all the facts alleged as having happened, and as existing prior to said levy.

This was followed with a prayer for general relief, and a receiver was appointed.

A stipulation was made and filed to the effect that the facts therein stated should be considered on the demurrer (p. 14, Record).

The principal facts stated in the stipulation are that there was no court in session, and the clerk entered the judgment of the Utah National Bank against Beardsley (under which Broom and Whitaker claim) without the act of any judge.

The demurrer to the amended and supplemental complaint was overruled, and the defendants (except Beardsley, who had remained in default) answered separately, in which answer they attack the consideration of plaintiff's note and mortgage.

In the findings every question of fact made has been decided against the defendants (p. 32, Record).

In said findings will be found the finding of full knowledge and notice as charged in the amended and supplemental complaint. The finding as to there being no judge in or for the district at the time of the rendition of the Utah National Bank judgment is also in the Record, page 35.

The judgment on which execution was issued, and through which Broom and Whitaker claim, to wit, that of the Utah National Bank *vs.* Beardsley (p. 38, Record) was void. It was rendered by the clerk of the court in vacation. This judgment was authorized by the Utah law, section 460, Laws of 1884, p. 233, but the statute is void. All judicial power is conferred by act of Congress on the courts. (Section 1907, Revised Statutes U. S.)

I submit that the clerk of the court had no judicial power. This was a bald case. The judge had resigned and his resignation had been accepted. The term of court had adjourned, and no judge had been assigned to the district and none was in the district when the clerk entered the default judgment under which Broom and Whitaker must claim (pp. 85, 86 of printed record).

A question as to the *bona fides* of the plaintiff, Armstrong, has been raised. It ought to be put at rest by reading of the testimony. But this court will not, I take it, consider the evidence.

There is evidence in the Record to sustain all the findings.

Some citations bearing on the principal question at issue:

Nixon *vs.* Stanley, 33 Hun., 247.

To the effect that if a mortgage which, under the statute, should be refiled within a year is not filed until after a year, the lien is restored as against an execution issued after the refiling.

Section 296, Jones on Chattel mortgages.

To the effect that advertising for sale the chattels mortgaged obviates the necessity of refiling.

I call attention to the opinion of the Supreme Court of Utah in this case by Zane, C. J., and the authorities cited in the opinion (p. 123, Record).

Respectfully submitted,

H. W. SMITH,

of Counsel for Appellee, James C. Armstrong.

Supreme Court of the United States.

OCTOBER TERM, 1890.

JOHN BROOM AND E. A. WHITAKER,
Appellants,

vs.

JAMES C. ARMSTRONG, *Appellee.*

BRIEF OF J. G. SUTHERLAND AND J. R. MCBRIDE, *for Appellee.*

The appeal in this case is from the affirmance of a judgment rendered in favor of appellee, June 2, 1886, and from the order, Nov. 5, 1886, denying appellants' motion for a new trial.

The action of the plaintiff below, now the appellee, was for foreclosure of a chattel mortgage, dated and made by defendant Beardsley on the 14th day of Januury, 1885, to secure the payment of his note for $8,000, payable in four months, with interest at the rate of one per cent. per month, and including ten per cent. for costs of collection, if not paid at maturity.

The judgment determined the amount due, over and above all payments, at the sum of $8,506.40, and directs a sale of the mortgaged property to satisfy the amount together with the costs.

The complaint was filed and *the action commenced on the 22d day of July, 1885*, or sixty-eight days after maturity of the mortgage debt.

The appellants are purchasers of the mortgage property at an execution sale made *August 23d, 1885*. That execution was against the mortgagor, on a judgment in favor of the Utah National Bank, rendered in the First District Court, on the 18th

day of March, 1885, upon a promissory note made by Beardsley. The appellants were made defendants by an amended and supplemental complaint.

The appellants purchased during the pendency of this action. They bought under an execution issued on a judgment which was rendered during the four months credit mentioned in plaintiff's mortgage. That mortgage was then of record, and confessedly executed and recorded in due form. The court below found that the note to plaintiff was made "for full value received by said Beardsley."

The plaintiff's mortgage was a valid lien on the property when the judgment was rendered in favor of the Utah National Bank. Beardsley obtained no new credit or forbearance from the Utah National Bank, on account of his possession of the mortgaged property.

I.

This mortgage being made in good faith to secure an actual debt, and the retention of possession by the mortgagor being consistent with its terms and purpose, it would not be deemed fraudulent at common law, nor under the operation of the statute of Elizabeth.

Twyne case, 1 Smith, Lead. Cas., 52, 53, 54, 56, 57.
Hamilton *vs.* Russell, 1 Cranch, 209.
Brooks *vs.* Marbury, 12 Wheat., 77, 82.
D'Wolf *vs.* Harris, 4 Mason, 515.
Head *vs.* Ward, 1 J. J. Marsh, 280.
Dana *vs.* Morten, 8 Dana, 247, 254.
Jordan *vs.* Turner, 3 Blackf., 309.
Haven *vs.* Low, 2 N. H., 13.
Ash *vs.* Savage, 5 *id.*, 545.
Barrow *vs.* Paxton, 5 John., 258.
Hall *vs.* Carnley, 2 Duer, 99.
Bissell *vs.* Hopkins, 3 Cow., 166.
Letcher *vs.* Norton, 4 Scam., 575.
Fairbanks *vs.* Bloomfield, 5 Duer, 434.
Jones on Chat. Mortges., §§ 320, 323.

The right of property may be in one person, and another may have possession. The law does not deem this a fraudulent severance. It may occur by agreement as in the case of bailment; it may occur by tort as in the case of trespass. When the severance occurs by agreement for an honest purpose, the common law does not in any case annex the right of property to the possession to protect anybody.

II.

The modern Statute of Frauds provides for an immediate and continued change of possession in cases of sales and mortgages, for the protection of creditors and purchasers. They differ, however, as to substitutes, and as to the consequences of the vendor or mortgagor retaining possession.

Where filing or recording of a chattel mortgage is provided for, such record is a substitute for a change of possession, and retention of possession is no evidence of fraud.

Jones on Chat. Mortges., § 236.
Robison *vs.* Elliott, 22 Wall., 513.
Frankhauser *vs.* Elliott, 31 Am. R., 171 and note.
Gay *vs.* Bedwell, 7 Mich., 519, 526.
Coles *vs.* Clark, 3 Cush., 399.
Morrill *vs.* Sanford, 49 Me., 560.

A chattel mortgage in Utah is *prima facie* good if recorded though the mortgagor in accordance with its terms retains possession.

L. 1884, p. 29.

The chattel mortgage in question was valid as to the Utah National Bank, when the latter obtained its judgment in March, 1885. Its debt had then been contracted; it then had no lien on this property. If it had given any credit to the debtor on account of his ownership or possession of this property, it acquired no lien, and at the time of obtaining its judgment, was in no way up to that time protected or benefitted by the Statute of Frauds, by no provision of the chattel mortgage act. At that time the plaintfff's debt alone was secured on the property. The plaintiff had recorded his mortgage, and the Utah National Bank, and the public generally, were thus notified of its existence.

The existence of that mortgage was no legal wrong to anybody. The retention of possession by the mortgagor was no legal wrong at that time to any person.

It was possible, however, for some person to purchase the property of the mortgagor, or to give him credit without actually knowing of the mortgage, while it was a legal record; during the period of credit or during the ninety days specified in the fifth section. Such a person would deal with the mortgagor at his peril; his loss would be one proceeding from his own imprudence; it would be one against which the laws have not undertaken to protect him.

If his condition is made better by the plaintiff's lien expiring because the plaintiff could not make it available by a complete foreclosure during the ninety days, then the plaintiff suffers injury in a loss of its debt without negligence, and the imprudent man retrieves his loss without exertion, and without any new exposure, cause of complaint, or ground of protection. Such consequences, it is believed, were not intended by the legislature no such transposition can be worked out by any just or rational interpretation of the Chattel Mortgage Act.

III.

The Utah National Bank and appellants are not entitled, under section five of the Chattel Mortgage Act, to claim protection as creditors or purchasers, against the continuance of the plaintiff's mortgage lien after expiration of the period mentioned in that section.

The purchasers mentioned in that section are unquestionably purchasers who buy from the mortgagor—persons who, deceived by his possession after the expiration of the ninety days, are induced to buy the property from him and pay for it, and who do so without actual knowledge of the mortgage. That is the proper construction of "purchasers" in the phrase, "subsequent purchasers and mortgagees." "Creditors" there mentioned, should be construed to mean creditors who became such after the expiration of the ninety days. No reason can be perceived for holding that a purchaser within the ninety days should have no

rights on the expiration of that time, but a prior creditor might then treat the mortgage as dead.

On a similar statute of Missouri, Thompson, J., said: "Although the word 'creditors' is used in the statute without qualification, and the word 'purchasers' is qualified by the word 'subsequent,' yet we are clear, in view of the manifest purpose of the statute, that the word creditors should be construed to mean *subsequent creditors.* This construction comports with the general policy of all acts which require the recording of instruments conveying personal property. That policy is, that a person shall not be allowed, by the possession of personal property which does not belong to him, or upon which another has a secret lien, to acquire a false credit, to the injury of those who may deal with him, either by giving him credit, or by becoming purchasers of the property. But the statute was never intended to enable a prior creditor to get title to the property of a stranger, on no better grounds than the fact that the stranger had been so incautious as to entrust the possession and use of the property to his debtor."

Defiance M. Wks. *vs.* Trisler, 21 Mo. App., 69, 71.
Wooley *vs.* Watson, 22 *id.*, 553.
Tufts *vs.* Thompson, *id.*, 565.

The New York statute provides that mortgages which have been filed should "cease to be valid against the *creditors* of the person making the same, or against *subsequent purchasers* or mortgagees, in good faith, after the expiration of one year from the filing thereof, unless they should be refiled within thirty days before the expiration of the year." Two mortgages were filed, one on the 22d day of January, 1847, and refiled on the 11th, 19th, 16th days of January in the three succeeding years. The other was filed November 11, 1846, but not refiled, and the holder of it took the property February 2d, 1849, which was the act complained of as a conversion. It was held that the party filing a mortgage on the 22d of January, 1847, though he kept his mortgage filed and refiled, was not a subsequent mortgagee.

Much *vs.* Patchin, 14 New York, 71, 73.

In Morrow *vs.* Reed, 30 Wis., 84, the court say:

"The object of requiring a mortgage of personal property to be filed or recorded is to give creditors and subsequent purchasers

notice of its existence when the mortgagor retains possession of the property."

People *vs.* Bristol, 35 Mich., 32.

In Kohl *vs.* Lynn, 34 Mich., 361, the court say on the same subject:

"The only object of the law is to protect those who acquired rights under circumstances which would render them liable to be defrauded unless protected against instruments of which they knew nothing *when they obtained* their rights."

In Fearey *vs.* Cummings, 41 Mich., 383, the court say:

"Inasmuch as the possession was not altered, if it (the mortgage) was not put on file prior to the plaintiff becoming *creditor*, it was invalid as against them, the law being that those who become creditors whilst the mortgage is not filed are protected."

The case, Waite *vs.* Mathews, 50 Mich., 392, involves the very question under consideration. The statute required an "immediate" change of possession unless the mortgage was filed, and provided that otherwise it should be absolutely void as against "creditors and subsequent purchasers and mortgagees in good faith." There was a delay in filing, but the party questioning the validity of the mortgage did not become a creditor during that time. The court say:

"This question was substantially decided in Kohl *vs.* Lynn, 34 Mich., 360, and Fearey *vs.* Cummings, 41 Mich., 376, where it was distinctly intimated that in order to justify the application of the statute making mortgages, whether honest or not, absolutely void for want of filing or possession, some act must be done, or some detriment sustained during the interval. There seems to be no good reason why a chattel mortgage, which is otherwise honest, should not become operative on delivery of the goods, and take effect from such delivery. * * * The object of the statute is to prevent, and not to facilitate fraud."

Parshal *vs.* Eggart, 54 N. Y., 22.

Stewart *vs.* Beale, 7 Hun., 405, 406.

So construed, the statute accomplishes its object; but construed to include all creditors, it is arbitrary, and confounds those within

the purpose of the statute, and needing protection, with those not within its purpose, nor deserving protection, at the expense of those who have diligently availed themselves of the statute. The construction affirmed by these authorities harmonizes with the common law doctrine on the subject of fraud. Wrong and injury have to concur to make a case for relief.

Zabriska *vs.* Smith, 13 N. Y., 329.
Hanson *vs.* Edgerly, 29 N. H., 343.
Tryda *vs.* Whitmarsh, 1 Met., 1.

It is laid down in Bacon's Abr. (title Statute I) that "statutes made in imitation of the common law shall be expounded according to the rules of the law in like cases." Also that "the intention of the makers of the statute is sometimes to be collected from the cause or necessity of making a statute; at other times from other circumstances. Whenever this can be discovered it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter." "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter." "A thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers."

People *vs.* Utica Ins. Co., 15 John., 358.
Jackson *vs.* Collin, 3 Cow., 89, 96.
McDermot *vs.* Lorrillard, 1 Edw., 373.
Brown *vs.* Thompson, 14 Bash., 538.

General words will have an extensive or restricted interpretation to carry out the precise purpose of the law-maker.

Smith *vs.* People, 47 N. Y., 330.
The Eureka Case, 4 Sawy., 316, 317.

The chattel mortgage act should have a reasonable construction in furtherance of the object the legislature had in view.

This object is explained in part in the cases already quoted. It is also thus explained in another case:

"The statute seems to have required the deposit [filing or recording], not merely for notice to creditors and purchasers, but

chiefly to show the transaction to have been actual and genuine, and to prevent secrecy and imposition, and to remove the presumption arising against good faith. It was to permit such mortgages to be given by men in business without requiring them to suspend their business, or give up possession of their stock in trade, on which they rely to raise the amount of the debt."

People *vs.* Bristol, 35 Mich., 32.
Jones on Chat. Mort'ges, § 190.

It is to be borne in mind that the Utah statute provides for no refiling or other ceremony for continuing a security by chattel mortgage. It will run ninety days after maturity of the debt, if such ninety days added to the period of credit do not make more than a year. To hold that a mortgage will cease as against *all* creditors on the expiration of ninety days is to deprive it of all beneficial effect. The statute is applicable by its terms to cases in which the mortgage stipulates that the mortgagor shall retain possession. Foreclosure cannot commence until after the debt becomes due. On the construction now contended against, that foreclosure must be completed within that time. Considering the time necessary to obtain a trial, the time which would be required in case of an appeal, no chattel mortgage would have sufficient longevity to reach a final judgment of foreclosure. Hence such a construction would render the act nugatory—defeat the object of the legislator in passing it.

The construction we contend for makes the mortgage a live security during the period mentioned in the statute; that it then ceases as to creditors and purchasers who become such after that period, unless the holder of the mortgage takes possession or does some equivalent act to enforce his security.

IV.

If the lien is valid when a foreclosure suit is commenced it will not cease or be impaired by lapse of time during the pendency of the suit.

Otis *vs.* Sill, 8 Barb., 102.
Case *vs.* Jewett, 13 Wis., 559.
Newman *vs.* Tymeson, 12 Wis., 448.
Jones on Chat. Mort., § 296.